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IN THE

SUPREME COURT OF THE UNITED STATES

NAOMI TREECE,

Petitioner,

v.

STEVEN HOCHSTETLER *and*
CITY OF NAPERVILLE, ILLINOIS,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the "institutional analysis" doctrine operates to allow municipal liability under 42 U.S.C. §1983 for an unreasonable seizure in violation of the Fourth Amendment to the U.S. Constitution, independently of whether the individual municipal employee involved is or is not liable for the constitutional violation?

Whether, for purposes of 42 U.S.C. §1983, state law malicious prosecution tort requirements of subjective wrongdoing are engrafted onto the objective test for unreasonableness applicable to unlawful seizures violative of the Fourth Amendment to the U.S. Constitution?

Whether severance of a 42 U.S.C. §1983 trial of a municipal employee from that of the municipality, such that evidence of conduct proving a tacit institutional "custom" that results in objectively unreasonable seizures is excluded, allows judgment to be entered in favor of the municipality if the municipal employee is found not liable for malicious prosecution?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding whose judgment is sought to be reviewed are Naomi Treece, plaintiff, and Steven Hochstetler and City of Naperville, Illinois, defendants.

The following individuals had been at various times parties to the proceedings in the district court, were dismissed from the action and are not involved in this proceeding: Larry Dickson and Michael Sullivan.

No parent corporations or publicly held companies are involved.

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The Seventh Circuit opinion, reported at 213 F.3d 360 (7th Cir. 2000), appears in the Appendix at 1a. The unpublished Order of the Seventh Circuit appears in the Appendix at 14a. The district court opinion denying Mrs. Treece's motion to supplement the record and defendants' motion for summary judgment, reported at 1998 WL 142391 (N.D. Ill. Mar. 25, 1998), appears in the Appendix at 15a. The district court opinion denying defendants' motion to reconsider denial of summary judgment, reported at 1998 WL 381703 (N.D. Ill. June 30, 1998), appears in the Appendix at 49a. The district court opinion, denying in part and granting in part defendants' motion to dismiss, is reported at 903 F. Supp. 1251 (N.D. Ill. 1995).

STATEMENT OF JURISDICTION

The date on which the judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was entered is May 17, 2000. This petition is filed within ninety days of that date. No rehearing was requested. The jurisdiction of this Court is invoked under 28 U.S.C. §§1254 and 2101.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST., amend. IV.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., amend. XIV, §1.

Section 5 of the Fourteenth Amendment to the United States Constitution provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST., amend. XIV, §5

The statute under which Petitioner sought relief was 42 U.S.C. §1983, which provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Rule 42(b) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> The court, in furtherance of convenience or

> to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim . . . always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Statement of the Case

Mrs. Naomi Treece, a twenty-year resident of the City of Naperville, Illinois (the "City"), was subjected to interrogation by City police officer Steven Hochstetler ("Hochstetler"), who accused her husband Otis Treece, an employee of the City of Naperville Electric Department, of involvement in a scheme to steal electrical wire from the City. Mrs. Treece spoke three times with Hochstetler, once by phone and twice in person at the Naperville Train Station.

Based upon police reports and testimony given by Hochstetler to a grand jury, criminal charges were brought on December 5, 1991, against Mrs. Naomi Treece for alleged criminal intimidation of Hochstetler. After Mrs. Treece was arrested, ordered to appear at trial, and caused to incur substantial legal fees, and after more than two years of criminal prosecution that included two plenary trials that resulted in mistrials, the prosecution on January 11, 1994, dismissed all criminal charges against Mrs. Treece. The criminal charges against Mrs. Treece's husband Otis were also dismissed on a defense

verdict rendered by a jury after only an hour's deliberations.

With respect to the Naomi Treece police reports, Hochstetler submitted an investigative supplementary police report alleging Mrs. Treece's intimidation, which read "3960 Intimidation" across the top, on September 26, 1991, which is one day prior to the alleged date of occurrence for intimidation that was reported in the Police General Case Report. The Naomi Treece reports in part allege intimidation based on Hochstetler's allegations that Treece was connected to a Tennessee crime family. However, neither Hochstetler, his supervisor, the chief of police, nor the City as an institution, did anything to investigate Mrs. Treece's alleged ties to a Tennessee crime family.

Hochstetler has a history of making false criminal reports and accusations. For example, in1988, Hochstetler accused Benham Zolghadr and Bahram Zolghadr of setting fire to Benham's restaurant; in July 1989, Hochstetler filed a police report allegedly tying Bahram Zolghadr to involvement with a Chicago crime family. Prior to being dismissed, Benham Zolghadr was indicted for arson of the restaurant upon Hochstetler's persistence; in 1991, Hochstetler accused Mr. Treece of theft; in 1992, he falsely accused the son of Mrs. Marjorie Dalton of arson, which resulted in Dalton's discrimination charge against Hochstetler; in 1993, he filed a false report regarding the investigation of Patricia Shetina's store. Again, in 1993, Hochstetler filed a false report about an investigation concerning Merrill Shepro.

Finally, in December 1993, the City took limited disciplinary action against Hochstetler, suspending him for twenty days (beginning January 13, 1994) for filing a false police report. When Hochstetler's supervisor questioned Hochstetler regarding the Shepro report, Hochstetler asked whether his supervisor wanted the official version or if this was between Hochstetler and his supervisor.

On September 12, 1994, Mrs. Treece filed a Civil Rights claim in the U.S. District Court for the Northern District of Illinois against Hochstetler and the City under 42 U.S.C. § 1983, to which the City responded by threatening to re-commence criminal proceedings against her. Undaunted by that threat, Mrs. Treece continued the civil action alleging that Hochstetler and the City violated Section 1983 by depriving her of her constitutional right to be free of unreasonable seizures, vouchsafed by the Fourth Amendment to the United States Constitution (applicable to the City by virtue of the Fourteenth Amendment). She also asserted state law tort claims. The District Court had jurisdiction over this Civil Rights action under 28 U.S.C. §§ 1331, 1343, and 2201.

This Court's decision in *Albright v. Oliver*, 510 U.S. 266, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994), had, according to the U.S. Court of Appeals for the Seventh Circuit, *see Reed v. City of Chicago*, 77 F.3d 1049, 1051-52 (7th Cir. 1996), thrown that Circuit's case law governing this type of Civil Rights claim into disarray. The Seventh Circuit, in *Reed*, thus enunciated a

rule which required Civil Rights plaintiffs in such cases to prove (i) all elements of state law malicious prosecution, and (ii) the elements for a violation of the Fourth Amendment, in order to make out a Section 1983 claim. In other words, the *Reed* decision imposed upon Civil Rights plaintiffs in the Seventh Circuit a requirement to prove "subjective" wrongdoing in addition to the "objective" unreasonableness of governmental conduct that applies under the Fourth Amendment.

The City moved for summary judgment seeking dismissal of Mrs. Treece's Civil Rights claims. The district court acknowledged that Seventh Circuit precedent required Mrs. Treece to prove state law malicious prosecution as an element of her 1983 claim. *Treece v. City of Naperville*, No. 94 C 5548 (N.D. Ill. Mar. 24, 1998). (App. at 22a) Denying summary judgment, the district court ruled that issues of fact existed because Mrs. Treece had evidence that might show that Hochstetler solicited a bribe in exchange for not making a false charge against Mr. Otis Treece – which raised an issue of fact as to his subjective malice for a state law tort of malicious prosecution -- and that the evidence of other incidents involving officers such as Hochstetler could establish a city custom or policy of acquiescing in the filing of false reports and charges of criminality.

A magistrate judge of the district court later ruled that the other incidents involving Hochstetler were admissible against the City; but, because they were not incidents involving a bribe or solicitation, the magistrate judge precluded Mrs. Treece from introducing evidence

of the incidents in the trial against Hochstetler. The magistrate judge then severed the claim against the City from the claim against Hochstetler for trial, and ordered the claims against Hochstetler to be tried first. As required by *Reed*, the court then instructed the jury that Hochstetler could be found liable only if Mrs. Treece proved he acted with personal malice toward her, thus imposing upon her the burden of proving a "subjective" element in order to make out a Section 1983 claim. The jury found in favor of Hochstetler. The magistrate judge then, *sua sponte*, ruled that the City could not have liability if Hochstetler lacked liability and summarily dismissed Mrs. Treece's case against the City. The clerk of the district court then entered judgment in favor of the defendants.

On appeal, the Seventh Circuit held that Mrs. Treece had not made out a case against Hochstetler as required by *Reed*. The Seventh Circuit also held that a municipality cannot have Section 1983 liability if its employee was found not to have such liability. (App. at 10a) On May 17, 2000, the Court of Appeals entered judgment affirming the district court's judgment. Mrs. Treece petitions for a writ of certiorari to review the judgment of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS, THAT MUNICIPAL SECTION 1983 LIABILITY REQUIRES LIABILITY ON THE PART OF A MUNICIPAL EMPLOYEE, CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS AND WITH PRIOR SUPREME COURT DECISIONS.

The Court of Appeals' decision should be reviewed because it conflicts with decisions of the Second, Third, Eighth, Ninth, Tenth and Eleventh Circuits as well as decisions of this Court. Specifically, the Seventh Circuit held that a municipality cannot be independently liable for a constitutional violation under 42 U.S.C. § 1983 when the individual officer was found not liable for a constitutional violation, irrespective of whether the nature and structure of the municipality caused the harm. (App. at 9a-11a) Moreover, the Seventh Circuit effectively held that municipal liability cannot exist even when the claims against the employee require proof of a subjective state-of-mind ("malice" or "intent"). The decisions of this Court consistently hold that a Section 1983 claim alleging a Fourth Amendment violation requires an objective rather than a subjective analysis. This Court has also acknowledged that tacit municipal approval of objectively unreasonable actions will make out a Section 1983 claim.

A. The Seventh Circuit Has Entered A Decision In Conflict With The Decisions of Other United States Courts of Appeals.

Mrs. Treece's Section 1983 claim is grounded in a violation of the Fourth Amendment's right to be free of unreasonable seizures. The possibility that the City committed a constitutional violation even though there was no finding of individual liability on the part of Officer Hochstetler exists because the nature or structure of an institution can still cause harm even in the absence of the malicious intent of its individual employees.

Known as the doctrine of "institutional analysis," institutions can be found liable because of the nature of the organizational structure, including informal arrangements and understandings. The gaps between formal rules take on informal practices which take on a perceived legitimacy of their own. The institution takes on a specific life of its own with its own attributes and qualities which must be understood. Institutional analysis recognizes that institutions can cause harm even in the absence of the malicious intent of some key employees. *See* Michael J. Gerhardt, *Institutional Analysis of Municipal Liability Under Section 1983*, 48 DEPAUL L. REV. 669, 685-86 (1999).

Under an institutional analysis, a court asks: (1) whether the institution's structure encourages or discourages adherence to constitutional standards of behavior; and (2) whether the institutional arrangement conceals consequences or dilutes responsibility in a way

conducive to unconstitutional behavior. *See* Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 257-58 (1986) (discussing the use of an institutional structure analysis for municipal liability, and suggesting that this Court applied the institutional analysis in *Owen* and other decisions).

The "institutional analysis" was most recently applied in *Barrett v. Orange County Human Rights Commission*, 194 F.3d 341 (2d Cir. 1999), where many of the actions complained of "were taken by the Commission as a whole, not by [the individuals] . . . themselves. It is therefore possible that the . . . commissioners did not as individuals violate [the plaintiff's] rights, but that the Commission did." *Id. at* 350. In Mrs. Treece's case, it was the City's informal custom or policy of permitting officers such as Hochstetler to falsify police reports and criminal accusations that caused constitutional harm to Mrs. Treece.

Despite the finding that Hochstetler was not liable, the City of Naperville could still be found liable. Hochstetler's prior misconduct in making false reports and accusations which the City countenanced or toward which it turned a blind eye, became Naperville's informal or tacit "custom or policy" of allowing constitutional violations. Naperville's insufficient action was deliberately indifferent. Based on Hochstetler's prior falsification of a police report in the *Shepro* matter alone, and especially when coupled with other misconduct, Naperville knew or at least should have known that

Hochstetler's conduct was of the type that if left uncorrected would lead to constitutional violations. The City acquiesced in Hochstetler's unreasonable conduct when, knowing of Hochstetler's prior accusations of other people having ties to organized crime, declined to investigate Treece's alleged ties to organized crime, as alleged by Hochstetler. Naperville's tacit countenancing of unreasonable conduct, resulting in the seizure of Mrs. Treece's person, comprised in the law an institutional violation of the Fourth Amendment and deliberate indifference to Mrs. Treece's constitutional rights.

The Seventh Circuit's decision conflicts with the Third Circuit's decision in *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994). *Fagan* involved a Section 1983 claim alleging that the municipality had a policy or custom of not properly training its police officers regarding high-speed pursuits. *Id.* at 1287. The Third Circuit specifically addressed whether a municipality could be held independently liable under Section 1983 where none of the individual officers were liable. *Id.* at 1291. Reaching the opposite conclusion to that of the Seventh Circuit, the Third Circuit emphasized that *City of Los Angeles v. Heller*, 475 U.S. 796, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986), should not be so broadly read so as to automatically preclude municipal liability absent an individual police officer's liability. *Id.* The Third Circuit held that "[a] finding of municipal liability does not depend automatically or necessarily on the liability of any police officer." *Id.* at 1292.

The Seventh Circuit's opinion is also inconsistent with that of the Second Circuit. *Barrett* concerned a Section 1983 claim by a public employee, Kevin Barrett, after Barrett was fired. 194 F.3d at 343. Barrett sued Orange County, the Orange County Human Rights Commission, and two County Commissioners. *Id.* The Court of Appeals for the Second Circuit reversed the lower court's ruling that municipal liability was contingent upon the liability of the individual defendants. *Id.* at 350. *Barrett* held that:

> [U]nder *Monell* municipal liability for constitutional injuries may be found to exist even in the absence of individual liability, at least so long as the injuries complained of are not *solely* attributable to the actions of named individual defendants.

Id. (citation omitted) (emphasis added). *Barrett* recognizes what the Seventh Circuit failed to in *Treece*, that so long as the injuries complained of are attributable to the municipality itself, independent liability may exist. *Id.*

The Seventh Circuit's opinion also stands in conflict with the Tenth Circuit. *Smith v. City of Oklahoma City*, 696 F.2d 784, 785 (10th Cir. 1983), involved a Section 1983 claim against Oklahoma City and four individual police officers, based upon allegations of an unlawful arrest. The police officers were dismissed during the trial and the jury returned a verdict for the municipality. *Id.* The Tenth Circuit reversed the district

court, holding the municipality liable under Section 1983 independent of the dismissal of the officers, based upon the city's "policy or custom" that caused the constitutional violation. *Id.* at 786-87. *See also Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985).

The Seventh Circuit's opinion also conflicts with that of the Eighth Circuit. In *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992), the police chief was found liable even though the officer involved was found not liable in his individual capacity, because "[a] public entity . . . may be liable under § 1983, even though no government individuals were personally liable." (citations omitted). *See also Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992) ("the police chief and city might be held liable for improper training or improper procedure even if [the officer] is exonerated . . . .").

The Seventh Circuit's opinion also conflicts with that of the Eleventh Circuit in *Anderson v. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985). Plaintiff Anderson alleged a constitutional violation pursuant to Section 1983 which resulted in her husband's death while he was in police custody. *Id.* at 680. Anderson sued the individual police officers, the City of Atlanta, Chief of Police, Commissioner of Department of Public Safety, and the Director of Bureau of Corrections of the City of Atlanta. *Id.* Despite a jury verdict in favor of plaintiffs, the trial judge entered a judgment notwithstanding the verdict. *Id.* Despite the rule that a plaintiff must first demonstrate some affirmative link between the policy and the particular constitutional violation (*see id.* at 685), the

court held that *Monell* and its progeny "do not require that a jury must first find an individual defendant liable before imposing liability on local government." *Anderson*, 778 F.2d at 686.

This conflict among the Circuits can only be reconciled by this Court's grant of certiorari to determine this issue respecting independent municipal liability despite individual non-liability, where the municipality is *not* sued *solely* on the theory that it is thought to be responsible for the individual's conduct.

B. The Court of Appeals Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions of This Court.

The Court of Appeals predicated its decision that the City could not have liability on the decision in *City of Los Angeles v. Heller*, 475 U.S. 796, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986). The Seventh Circuit's application of the *Heller* rule is inconsistent with this Court's opinion in *Heller*.

Heller concerned a Section 1983 excessive force claim against the individual officers, the City of Los Angeles, and members of the police commission. *Id.* at 797. The district court bifurcated the trial and first heard claims against one of the individual officers, which resulted in a jury verdict in favor of that officer. *Id.* at 797-98. The district court then dismissed the action against the City of Los Angeles, asserting that the City of Los Angeles could not be liable if the officer was

exonerated. *Id.* at 798. This Court declined to hold the City of Los Angeles liable because the municipality was "sued only because they were thought legally responsible for [the officer's] actions . . . ." *Id.* at 799. The municipality in *Heller* was *not* argued to be responsible for *more than* merely the officer's actions.

In *Canton v. Harris*, 489 U.S. 378, 383, 103 L. Ed. 2d 412, 423, 109 S. Ct. 1197 (1989), the concern was whether a municipality could be held independently liable under Section 1983 for its "custom or policy" of failure to train. Harris' claim centered around the failure to provide medical attention while she was in police custody, where police officers left Harris on the floor of the station. *Id.* at 381. The Court held that, where a municipality's actions constitute a "deliberate indifference" to the rights of its inhabitants, it can be actionable under Section 1983. *Id.* at 389. A city's shortcomings can represent "policy or custom" when such inadequacies are so obvious and likely to result in a violation of constitutional rights that policymakers of the city can reasonably be said to have been deliberately indifferent to the inadequacies. *Id.* at 390. The Court noted that deliberate indifference can be shown by "a pattern of violations from which a kind of 'tacit authorization' by city policymakers can be inferred." *Id.* at 397 (citations omitted).

The Seventh Circuit's opinion also ignores *Owen v. City of Independence*, 445 U.S. 622, 63 L. Ed. 2d. 673, 100 S. Ct. 1398 (1980). *Owen* involved a Section 1983 claim for violation of Owen's constitutional right to due

process. *Id.* at 630. Owen named the municipality, city manager, and members of the city council in their official capacities. *Id.* *Owen* concerned the scope of municipal immunity under Section 1983. *Id.* at 635. Based on the statutory language and the legislative history, this Court held that municipalities could not enjoy immunity from damages liability emanating from their constitutional violations. *Id.* at 657. The Court stated that "[n]o longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct." *Owen*, 445 U.S. at 657.

The Seventh Circuit does not properly apply the *Heller* rule to this case. In our case, the Seventh Circuit failed to even consider that the City of Naperville could be independently liable for the harm it caused Mrs. Treece as a result of Naperville's own actions. Our case was not one of liability based *solely* on Hochstetler's actions. Instead, Mrs. Treece claimed that the City had a custom and practice of permitting its officers to violate the constitutional rights of its citizens and allowing the commencement and continuance of proceedings based on false allegations, statements, and reports of its officers, which conduct was well-known to the supervisory police officers.

The City's knowledge of Hochstetler's prior falsification of a police report, allegations of other false reports, and his 1983 suspension for not following department policy, put Naperville on notice that it was obvious or likely that a constitutional violation would

occur. This constituted a city policy or custom of acquiescing in Hochstetler's false police reports and accusations. The City's belated suspension of Hochstetler does not sufficiently rebut the fact that Naperville allowed such conduct to recur. This represented a *Canton*-like "deliberate indifference" to the constitutional rights of Naomi Treece provided by the Fourth Amendment. *See Canton*, 489 U.S. at 390 & 397. The Seventh Circuit failed to even address the Court's ruling in *Owen*, and instead summarily dismissed the City of Naperville based on a jury finding of Hochstetler's non-liability. The Seventh Circuit completely disregarded the possibility that Naperville ought not be entitled to escape legal accountability for its policy or custom which violated Mrs. Treece's constitutional rights.

II.

THE DECISION OF THE COURT OF APPEALS, THAT SECTION 1983 LIABILITY IN "MALICIOUS PROSECUTION" CASES REQUIRES PROOF OF STATE TORT LAW SUBJECTIVE ELEMENTS, DECIDED AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE SETTLED AND DID SO IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Fourth Amendment to the United States Constitution provides for the right of people to be secure in their persons, houses, papers, and effects, against unreasonable seizures. *See* U.S. CONST., amend. IV. This

Court's decisions establish that "reasonableness" in the Fourth Amendment means "objective" reasonableness, the question being "whether the officers' actions are 'objectively reasonable' . . . without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397, 104 L. Ed. 2d 443, 456, 109 S. Ct. 1865 (1989). *See also Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906, 88 S. Ct. 1868 (1968) (the "reasonableness" of a particular search or seizure is to be judged by an objective standard).

This Court stated in *Albright*, 510 U.S. at 278-79, that a person's "seizure" may continue beyond arrest itself. In fact, where seizure once concerned the period up to the arrest, it now includes the period between arrest and release, as well as the period subsequent to release but up to trial. The rationale is that:

> A person facing serious . . . charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject . . . to the condition that he seek formal permission from the court . . . before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, . . . he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.

> A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant released pretrial is not still "seized" in the constitutionally relevant sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and answer the state's charges.

Id. (Ginsburg, J., concurring).

Mrs. Treece was subjected to an unreasonable seizure in violation of the Fourth Amendment. First, Mrs. Treece was not secure in her person when an arrest warrant was issued for her arrest on December 5, 1991 based on false statements by Hochstetler, in a City that tacitly allowed false statements and accusations. Then, Mrs. Treece was not secure in her property when she paid a bond premium as security for performance of the bond agreement. Mrs. Treece's Fourth Amendment rights were also violated when she became subject to the terms and conditions of the December 6, 1991, bail bond that restricted her right to travel, as she was not permitted to leave the State of Illinois without permission of the Eighteenth Judicial Circuit Court of Dupage County, Illinois. Furthermore, Treece was not secure in her person because she was required personally to appear and answer charges in court on December 19, 1991. With respect to the charges Mrs. Treece was required to

answer, she was not secure in her person because her reputation was tarnished as a result of the charges and the subsequent trials she endured -- which ultimately resulted in a *nolle prosequi*. Mrs. Treece was also not secure in her property as a result of having incurred substantial legal fees in defending the actions instituted and continued by The City of Naperville. The Fourth Amendment protects against unconstitutional deprivations of this sort. *See, e.g., Albright*, 510 U.S. at 277-79. (Ginsburg, J., concurring).

The violation by Hochstetler or the City of the Fourth Amendment and the resultant deprivations suffered by Mrs. Treece give rise to a Section 1983 claim to be judged by an objective test, not a subjective test. But, the rule of the Seventh Circuit improperly imposes an element of intent or malice within a Section 1983 claim under the Fourth Amendment. *See Reed*, 77 F.3d at 1051 (in the Seventh Circuit, a claim for malicious prosecution under Section 1983 requires a showing that: (1) the state law elements for malicious prosecution have been met (which requires a showing of *subjective* "malice"); (2) the act was committed by a state actor; and (3) plaintiff was deprived of liberty). Application by a jury of this Court's *objective* test, rather than the Seventh Circuit's *subjective* standard, in Fourth Amendment claims, makes it entirely possible that a municipality could be independently liable because of its institutional structure and behavior, despite a finding that an individual officer was not liable. Logic confirms that the municipality's actions could be found unreasonable under the Fourth Amendment despite the individual officer

lacking legal liability. The Seventh Circuit's decision that the subjective elements of state malicious prosecution law must be proven to make out a federal Section 1983 claim presents an important federal question that should be settled and conflicts with relevant decisions of this Court.

III.

SEVERING THE TRIAL OF THE MUNICIPALITY, AT WHICH EVIDENCE OF ITS UNCONSTITUTIONAL, TACIT POLICY WOULD BE INTRODUCED, FROM THAT OF THE MUNICIPAL EMPLOYEE WITH A RULING THAT SUCH EVIDENCE NOT BE INTRODUCED, *DE FACTO* CONFLICTED WITH THIS COURT'S DECISIONS AND DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

While Mrs. Treece's case rests upon the legal premise that objectively unreasonable conduct by a municipality, as judged by the institutional analysis, gives rise to Section 1983 liability, the Seventh Circuit misapplied FED. R. CIV. P. 42(b) so as to eviscerate the substantive law. Though the bifurcation was theoretically an attempt to prevent prejudice to Hochstetler for his individual liability, it instead unduly prejudiced Mrs. Treece by depriving her of the use of evidence admittedly admissible on her claim against Naperville. Under the Seventh Circuit's analysis, the City cannot have liability unless Hochstetler has liability, yet the jury need never hear the evidence critical to an institutional analysis.

This kind of bifurcation should not occur because "[t]he difficulty of establishing an officer's liability at the first trial, frequently due to sufficiency of proof problems and jurors' pro-police bias, may cause a jury to find in the officer's favor despite believing that the plaintiff has sustained a constitutional injury." Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 503 (1993). The Seventh Circuit's erroneous interpretation of *Heller*, so as to require individual liability in order for there to be municipal liability, when combined with the bifurcation, improperly allowed the defense attorneys to avoid both individual and municipal liability. *See Heller,* 475 U.S. at 807-08 (Stevens, J. dissenting). *See also*, Colbert, *supra*,44 HASTINGS L.J. at 543. The bifurcation prevented Mrs. Treece from establishing Naperville's responsibility for tolerating and condoning Hochstetler's police practices.

It is quite possible that, upon the jury's objective consideration of Hochstetler's police practices in a separate case against the City of Naperville, the City could be found liable for its deliberate indifference regarding its knowledge of police officer misconduct of falsifying reports and charges of criminality. In short, the bifurcation of claims violated the well-established rule that bifurcation is an abuse of discretion if it is unfair or prejudicial to a party. *See Angelo v. Armstrong World Indus.*, 11 F.3d 957, 964 (10th Cir. 1993) (citations omitted). This *de facto* conflict with the law governing "institutional analysis" Section 1983 liability and the sanctioning of a departure from accepted and usual

course of judicial proceedings require review of this case by this Court.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit as prayed.

August 10, 2000

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-1283

NAOMI TREECE,

Plaintiff-Appellant,

v.

STEVEN HOCHSTETLER and CITY OF NAPERVILLE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division,
No. 94 C 5548 - **Rebecca R. Pallmeyer**, *Judge*

ARGUED FEBRUARY 17, 2000 -- DECIDED MAY 17, 2000

Before HARLINGTON WOOD, JR., COFFEY and RIPPLE,
Circuit Judges.

COFFEY, *Circuit Judge*. Plaintiff Naomi Treece ("Treece") filed a section 1983 federal civil rights suit against officer Steven Hochstetler ("Hochstetler") of the City of Naperville police department and the City of Naperville ("City"), alleging that they maliciously

prosecuted her.[1] After the City "agree[d] to entry of judgment against [itself]" should "the jury enter[ ] a finding of liability against Defendant Hochstetler," the judge bifurcated the trial, removing the City from the trial, and ordered Treece's section 1983 action against Hochstetler to proceed. The jury returned a verdict in favor of Hochstetler and the judge accordingly entered a judgment on the verdict in favor of Hochstetler and entered a summary judgment in favor the City.[2] The plaintiff moved for a new trial and the court denied the request. Treece appeals, arguing that the court abused its discretion when it bifurcated the trial and in excluding evidence of Hochstetler's prior "bad acts." Treece also appeals the judge's entry of summary judgment in favor the City. AFFIRM.

I. BACKGROUND

On September 21, 1991, Naperville police officer Hochstetler received an anonymous tip describing an unusually large amount of scrap wire in the open bed of a pick-up truck parked in the driveway of Treece and her husband, Otis Treece ("Otis"). Pursuant to the police

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[1]Treece also claimed malicious prosecution and intentional infliction of emotional distress under Illinois state law.

[2]The summary judgment entered in favor of the City is consistent with the well established principle that a municipality is not liable for a constitutional injury unless there is "a finding that the individual officer[ ] [is] liable on the underlying substantive claim." *Tesch v. County of Green Lake*, 157 F.3d 465, 477 (7th Cir. 1998). The jury returned a verdict in favor of Hochstetler, and thus found no liability on the officer's part.

department supervisor's instructions, Hochstetler went to the Treece residence to verify the information and discovered what he described as a large amount of scrap wire in Otis' pick-up truck.[3] Also found was a box, containing some of the same scrap wire, addressed to the Naperville Electric Department. The scrap wire and box were seized and retained as evidence, and shortly thereafter, Otis was suspended from his job.[4]

A few days later, Larry Dickson, a fellow Naperville police officer, informed Hochstetler that Treece had attempted to contact him. That evening, Hochstetler telephoned Treece and he arranged to meet with her at the Naperville train station the next day. He stated that they conversed for about fifteen minutes, but Hochstetler's and Treece's accounts of what transpired are vastly different. Treece alleges that Hochstetler demanded a $100,000 bribe to drop the charges against her husband. Hochstetler, on the other hand, claims that Treece told him that she was connected to an Eastern Tennessee crime family and threatened that unless the charges against her husband were dropped, he would be shot and his house would be blown up.

After the meeting, Hochstetler informed his supervisor and the State's Attorney's Office of Treece's threats, and

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[3]Otis gave Hochstetler permission to search his truck.

[4]On October 1, 1991, Otis Treece was charged with felony theft, but he later was acquitted of that charge. Thereafter, he was reinstated to his job with the City's Electric Department.

obtained an order from a judge dated September 30, 1991, authorizing the police to record his conversations with Treece. They met again at the Naperville train station on October 1, 1991, and Hochstetler was wired with a recording device. During the conversation, Treece told Hochstetler that "I don't think your family is in danger, I think it is a fact." One week later, Hochstetler taped a phone conversation with Treece, during which she repeated that his family was in a state of danger.

On October 13, 1991, Hochstetler observed Treece in the Naperville Police Department parking lot while she appeared to be filming the license plate numbers of the police officers' personal automobiles with a video camera. Treece contends that she was filming geese on a nearby lake and did not notice the "No Trespassing-Authorized Vehicles Only" sign. Contrary to her assertions, Treece can be heard on the video tape stating, "Keep fearing Steve, cause it will happen. Word has already come down." Another encounter occurred two days later when Treece attempted to take pictures of Hochstetler and his family during a charity go-cart race. Hochstetler filed police reports detailing these incidents and informed the State's Attorney's Office, which in turn decided to seek charges against Treece.

Based on these incidents, a DuPage County, Illinois grand jury returned a state criminal indictment charging Treece with three counts of intimidation under 720 Ill.

Comp. State. 5/12-6(a).[5] At trial, the state's attorney had difficulty prosecuting her and after two mistrials, *nolle-prossed* the case. Six months later, Treece filed a section 1983 civil rights suit in federal court, alleging that Hochstetler and the City of Naperville had maliciously prosecuted her. As mentioned previously, according to the stipulation in the record, the City "agree[d] to entry of judgment against [itself]" should "the jury enter [ ] a finding of liability against Defendant Hochstetler." The judge accordingly bifurcated the trial, removing the City from the trial, and ordered Treece's section 1983 action against Hochstetler to proceed. During trial, in spite of an objection on the part of Treece, the court excluded evidence in so far as Hochstetler's prior "bad acts," which Treece claims would have established that he engaged in a pattern of soliciting bribes and falsely charging individuals with crimes when the bribes were not paid.[6] The jury returned a verdict in favor of Hochstetler, and the judge thereafter entered a judgment on the verdict in favor of Hochstetler and entered a summary judgment in favor of the City, and

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[5]"A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another, whether in person, by telephone or by mail, a threat to perform without lawful authority any of the following acts: (a) Inflict physical harm on the person threatened . . . ."

[6]But it is interesting to note that among these purported prior "bad acts," nobody accused Hochstetler of "shaking them down" or demanding a bribe. Thus, the trial judge found that Treece "offered no credible purpose for [its] admission," and excluded the evidence in the case. We also note that two of the four alleged "bad acts" occurred after Treece's indictment on the state charges.

denied Treece's motion for a new trial. Treece appealed.

II. ISSUES

On appeal, Treece argues that the court: (1) abused its discretion in excluding evidence of Hochstetler's prior "bad acts"; (2) erred in entering a summary judgment for the City; and (3) abused its discretion when it bifurcated the trial.

III. ANALYSIS

A. The District Court's Exclusion of Prior "Bad Acts" Evidence

Treece contends that the district court abused its discretion by excluding evidence of Hochstetler's prior "bad acts." We review a court's decision to exclude Rule 404(b) evidence under the abuse of discretion standard. *See United States v. Griffin*, 194 F.3d 808, 820 (7th Cir. 1999).[7] In reviewing a judge's determination of the admissibility of Rule 404(b) evidence, "we must accord great deference to the [trial] court's assessments because of the judge's first

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[7]Fed. R. Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

hand exposure to the evidence and because of the judge's familiarity with the case and ability to gauge the impact of evidence in the context of the proceeding." *United States v. Asher*, 178 F.3d 486, 494 (7th Cir. 1999).

We utilize a four-prong test to determine the admissibility of prior "bad acts" evidence under Fed. R. Evid. 404(b). Under this test, evidence of prior crimes, wrongs, or acts may be admitted when:

> (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged; (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue; (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act; and (4) the probative value of the evidence is not outweighed by the danger of unfair prejudice.

Asher, 178 F.3d at 492.

Treece argues that the prior "bad acts" evidence satisfies the first and second prongs of the test because it established Hochstetler's "modus operandi" -- his "common scheme" or pattern of conduct of soliciting bribes and then filing false police reports to support the trumped up charges when the bribes are not paid. Indeed, we have held that prior "bad acts" evidence is admissible under Rule 404(b) to demonstrate modus operandi. *See United States v. Smith*, 103 F.3d 600, 603 (7th Cir. 1996). But we have cautioned that "[i]f defined broadly enough, modus operandi evidence

becomes nothing more than the character evidence that Rule 404(b) prohibits." *Id.* Thus, in order to ensure that the evidence at issue is not offered to establish Hochstetler's propensity to commit the acts for which he is accused, "we require that *[the prior bad acts] evidence bear 'a singular strong resemblance to the pattern of the offense charged.'*" *United States v. Robinson*, 161 F.3d 463, 468 (7th Cir. 1998) (emphasis added) (quoting *United States v. Shackleford*, 738 F.2d 776, 783 (7th Cir. 1984)).

Treece's federal suit essentially accused Hochstetler of violating her constitutional rights by demanding a bribe from her in exchange for dropping the charges against her husband. The trial judge found, and we agree, that the record reflects that none of Hochstetler's purported prior "bad acts" revealed any information, much less, any allegations of Hochstetler "shaking down" individuals or demanding a bribe in exchange for the dismissal of the charges. Thus, these incidents are not "sufficiently idiosyncratic to permit an inference of pattern." *See United States v. Hudson*, 884 F.2d 1016, 1021 (7th Cir. 1989). Accordingly, because the excluded evidence of Hochstetler's prior "bad acts" did not "bear a singular strong resemblance to the pattern of the offense charged," *Robinson*, 161 F.3d at 468 (internal quotations omitted), we conclude that the district court did not abuse its discretion in excluding this evidence.

B. The District Court's Entry of Judgment for the City

Next, despite the jury's verdict in favor of Hochstetler,

Treece baldly claims that the trial court erred in entering a summary judgment thereafter in favor of the City of Naperville because, she contends, the City could still have been found independently liable based on its knowledge of Hochstetler's acts and failure to take action thereafter. Treece's unsupported assertion[8] fails as a matter of law because it is well established in this Circuit that municipality's liability for a constitutional injury "requires a finding that the individual officer[ ] [is] liable on the underlying substantive claim." *Tesch*, 157 F.3d at 477. Similarly, in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), the Supreme Court held that:

> neither *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. *If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excess force is quite beside the point.*

Id. at 799 (emphasis added). Indeed, *Heller* establishes that a city's liability is derivative of its police officer's liability.

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[8]In her brief, Treece misinterprets the prevailing law on this issue and fails to direct this court's attention to any properly construed case that supports her assertion.

See id. Likewise, because a jury has determined that Hochstetler was not liable for committing a constitutional deprivation (tort) against Treece, it is impossible under existing case law for the City to be held liable for its knowledge or inaction concerning its officer's activity. *See Gossmeyer v. McDonald*, 128 F.3d 481, 494 (7th Cir. 1997) ("Here, the Sheriff's Department cannot be found liable because [the officers'] actions did not constitute, nor did they cause, a constitutional tort."); *Thompson v. Boggs*, 33 F.3d 847, 859 n.11 (7th Cir. 1994) ("*Monell* expressly holds that there is no cause of action for *respondeat superior* liability against a municipal corporation under 42 U.S.C. § 1983.").

Indeed, as we held in *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 596-97 (7th Cir. 1997),

> [h]aving decided that the officers did not violate the Constitution, we must conclude that neither the City nor [police chief] can be held liable for [the plaintiff's] death . . . . [I]f the [officers] inflicted no constitutional injury on [the plaintiff], it is inconceivable that the [City and police chief] could be liable . . . . Neither the City nor the police officer's supervisor can be held on a failure to train theory or on a municipal policy theory absent a finding that the individual officers are liable on the underlying substantive claim.

No convincing case law has been presented to us (nor have we discovered any) that would compel us to deviate from the law as it now exists. Accordingly, because the jury returned a finding of liability in favor of Hochstetler, we

conclude that the district court did not err in entering a summary judgment in favor of the City.

C. The District Court's Bifurcation of the Trial

Finally, Treece contends that the court abused its discretion when it bifurcated the trial, thereby removing the City from the trial and ordering Treece's section 1983 action against Hochstetler to proceed. "The district court has considerable discretion to order the bifurcation of a trial, and we will overturn this decision only upon a clear showing of abuse." *Krocka v. City of Chicago,* 203 F.3d 507, 516 (7th Cir. 2000) (internal quotations omitted). We have held that "Federal Rule of Civil Procedure 42(b) permits the separate trial of any issue when separation would be in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." *Berry v. DeLoney*, 28 F.3d 604, 610 (7th Cir. 1994) (internal quotations omitted). "Only one of these criteria need be satisfied for a court to order a separate trial." *Id.*

Here, bifurcation avoided the needless costs and burdens of a second trial, as well as, but not limited to, the waste of the valuable time and resources of the court, and the inconveniencing of witnesses, especially in light of the fact that the City "agree[d] to entry of judgment against [itself]" should "the jury enter[ ] a finding of liability against Defendant Hochstetler." Further, as previously discussed, under established law, the liability of the City of Naperville was derivative of Hochstetler's liability. *See Gossmeyer*, 128 F.3d at 494. Thus, we conclude that the trial judge's bifurcation of the trial against Hochstetler and the City was

proper and, accordingly, was not an abuse of discretion.

VI. CONCLUSION

We hold that the trial judge did not abuse her discretion when she excluded evidence of Hochstetler's prior "bad acts" and did not err when she entered a summary judgment in favor of the City. We also hold that the court did not abuse its discretion when it bifurcated the trial. The decision of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court
of
Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: May 17, 2000
BEFORE: Honorable HARLINGTON WOOD, JR., Circuit Judge
Honorable JOHN L. COFFEY, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge

No. 99-1283

NAOMI TREECE,

Plaintiff - Appellant

v.

STEVEN HOCHSTETLER and CITY OF NAPERVILLE,

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 94 C 5548, Regecca R. Pallmeyer, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.
(1061-110393)

United States District Court, N.D. Illinois.

Naomi TREECE, Plaintiff,

v.

CITY OF NAPERVILLE, a Municipal Corporation, et al., Defendants.

No. 94 C 5548.

MEMORANDUM OPINION AND ORDER

WILLIAMS, J.

Plaintiff Naomi Treece brings this cause of action against Defendants Officer Hochstetler and the City of Naperville. Plaintiff seeks damages for three separate counts: (1) malicious prosecution under 42 U.S.C. § 1983, (2) malicious prosecution under state law, and (3) intentional infliction of emotional distress. Defendants move this court to grant summary judgment on all three claims pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff also moves this court to supplement the record. For the reasons stated below, the court denies Plaintiff Treece's motion to supplement the record and defendants' motion for summary judgment.

Background

In 1991, Plaintiff Naomi Treece ("Treece") was indicted for three counts of intimidation and prosecuted in two jury trials. (Defs' Ex. U; Pl.'s Mem. at 4.) The charges were eventually dismissed pursuant to a nolle prosequi order.

(Defs.' Ex. O.) Treece's claims against Officer Hochstetler ("Hochstetler") and the City of Naperville ("the City") arise out of the conduct of Hochstetler leading up to her indictment.

On September 25, 1991, Hochstetler appeared at Treece's residence to investigate a potential theft of copper and aluminum wire. (Defs.' 12(M) ¶ 1.) [FN1] He saw a truck outside with a sheet over it in the driveway and wondered "what [was] going on." (Pl.'s Compl. ¶ 9.) He proceeded to search the house without a warrant. (Treece at 38.) He repeatedly asked Treece and her husband ("Otis") to sign a permission form to search the home and threatened them that Otis could lose his job if they refused. (Treece at 39.) They both refused to sign the permission form to search the house and asked him to leave. (Treece at 46, 58.) When Treece refused to sign the form, Hochstetler pushed her to the floor. (Treece at 59.) During the search, Hochstetler located some scrap aluminum wire in Otis's truck. (Compl.¶ 25.) Hochstetler thought that the wire might be tied to a theft ring operation at the Naperville Electric Department, where Otis worked. (Treece at 209.) On October 1, 1997, Otis was charged with theft. (Defs.' 12(M) ¶ 3). He was later acquitted of the offense. (Pl.'s Compl. ¶ 81).

FN1. Throughout this Memorandum Opinion, the term "12(M)" refers to the statement of material facts submitted by defendants pursuant to Rule 12(M)(3) of the Local Rules of this court. The term "12(N)" refers to the response to defendants' statement submitted by Treece pursuant to Local Rule 12(N)(3).

The following day, Treece went to inquire about the design and construction of a home that she had admired. (Compl.¶ 30.) The home was owned by Officer Dickson, another Officer with the Naperville Police Department. (Defs.' 12(M) ¶ 5.) Officer Dickson testified that Treece asked if he was Hochstetler. (Defs.' 12(M) ¶ 7.) For reasons that are not apparent, Officer Dickson ran Treece's license plates. (Defs.' 12(M) ¶ 8.) He called Hochstetler and told him that Treece was looking for him. (Defs.' 12(M) ¶ 5.) Hochstetler then called Treece at home that evening. (Defs.' 12(M) ¶ 9.) During their conversation, Hochstetler arranged to meet with Treece at the Naperville train station. (Defs.' 12(M) ¶ 10; Pl.'s 12(N) ¶ 10.)

The next day, they met at the train station. (Defs.' 12(M) ¶ 13 .) The events that took place during this meeting are in dispute. Treece claims that Hochstetler offered to drop the charges against her husband in exchange for $100,000. (Pl.'s 12(N) ¶ 14.) Hochstetler testified that Treece threatened to harm him and his family if he did not drop the charges. (Defs.' 12(M) ¶ 14.) Following this conversation, Hochstetler filed a report charging Treece with intimidation. (Defs.' Ex. U.) Hochstetler requested and received permission to tape subsequent conversations with Treece. (Defs.' 12(M) ¶¶ 17, 18.) Hochstetler then called Treece to set up another meeting. (Defs.' 12(M) ¶ 19.) On October 1, 1991, Treece and Hochstetler met at the train station. (Defs.' 12(M) ¶ 21.) During the meeting, Hochstetler wore a body wire and taped their conversation. (Defs.' Ex. B, C.) One week later, on October 8, 1991, Hochstetler called Treece, they met, and Hochstetler again recorded the conversation. (Defs.' Ex. D, E.)

On two other occasions Hochstetler filed two subsequent police reports against Treece. On October 11, 1991, Hochstetler filed a report alleging that Treece was present in the parking lot of the Naperville Police Station, a restricted area, with a video camera. (Defs.' 12(M) ¶ 38, Pl.'s 12(N) ¶ 38, Treece Ex. 3 at 14.) On October 13, 1991, Hochstetler filed another report after an encounter with Treece in downtown Naperville at a go-cart racing event. The report alleged that he noticed Treece trying to take pictures of him and that at least twice she attempted to "gain a clear shot" of him. (Treece Ex. 3 at 16.)

Based on Hochstetler's reports and allegations, Treece was summoned to appear before a Dupage County grand jury and indicted on November 8, 1991 for three counts of intimidation. (Defs.' Ex. U.) As a result, Treece turned herself in. (Pl.'s Compl. ¶ 79.) Treece's case went to jury trial twice. (Pl.'s Mem. at 4.) The first trial resulted in a hung jury. (Defs.' 12(M) ¶ 46.) The second trial returned a verdict of not guilty, which was overturned on a post-trial motion. (Zellner at 11.) On January 11, 1991 the judge entered a nolle prosequi order pursuant to the government's request. (Defs.' Ex. O.) The nolle prosequi order restored the charges against Treece to the state that existed prior to the initiation of the prosecution. Treece then filed this suit.

Motion for Summary Judgment

Defendants move the court to enter summary judgment on their behalf under Rule 56 of the Federal Rules of Civil Procedure. The court will render summary judgement only if the factual record shows "that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Bratton v. Roadway Package Sys., Inc., 77 F.3d 168, 173 (7th Cir .1996) (quoting Fed.R.Civ.P. 56(c)). The court will not render summary judgment if "a reasonable jury could return a verdict for the nonmoving party." Sullivan v. Cox, 78 F.3d 332, 325 (7th Cir.1996) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248(1986)). In ruling on a motion for summary judgment, the court views the facts in the light most favorable to the nonmoving party. Bratton, 77 F.3d at 171 (citation omitted); Sullivan, 78 F.3d at 325 (citation omitted).

On a motion for summary judgment, the moving party "bears the initial burden of showing that no genuine issue of material fact exists." Hudson Ins. Co. v. City of Chicago Heights, 48 F.3d 234, 237 (7th Cir.1995) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Then the burden shifts to the nonmoving party, which "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); accord, NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 234 (7th Cir.) (citations omitted), cert. denied, 115 S.Ct. 2249 (1995).

These burdens are reflected in Rule 12 of the Local General Rules for the Northern District of Illinois. Waldridge v. American Hoechst Corp., 24 F.3d 918, 921-22 (7th Cir.1994). Under Rule 12(M)(3), the moving party must submit a statement of material facts in the form of short numbered paragraphs supported by specific references to the factual record. Under Rule 12(N)(3), the nonmoving party must submit a response to each such paragraph, including (in the case of disagreement) specific

references to the factual record. If the nonmoving party fails to disagree with a fact in the moving party's 12(M) statement, the court will deem that fact admitted. See Local Rule 12(N)(3). Similarly, if the nonmoving party disagrees with a fact in the moving party's statement but fails to support its disagreement with a specific reference to the factual record, the court may deem that fact admitted as well. Fed.R.Civ.P. 56(e); Flaherty v. Gas Research Institute, 31 F.3d 451, 453 (7th Cir.1994) (citations omitted). Rule 12(N)(3) further instructs the nonmoving party to submit a statement of any additional facts requiring denial of summary judgment, in the form of short numbered paragraphs supported by specific references to the factual record. In turn, Rule 12(M)(3) instructs the moving party to submit a concise reply to any such additional facts, including (in the case of disagreement) specific references to the factual record.

In this case, Treece has failed to follow the clear guidelines set out in the Local Rule 12(N). When responding to Defendants' Rule 12(M)(3) statement of material facts, Treece admitted, denied, or denied knowledge of the factual allegations and included additional factual assertions beyond the response required by Rule 12(N)(3)(a). In several instances, Treece failed to cite to any portion of the record. A plaintiff's failure to abide by these rules can often be fatal. See Valenti v. Qualex, Inc., 970 F.2d 363, 369 (7th Cir.1992) ("[A] Rule 12 responsive statement that is a flat denial, without reference to supporting materials, or with incorrect or improper references to supporting materials, or with incorrect or improper references, and containing irrelevant additional facts, has no standing under Rule 12(N)."). However, the

court has discretion to enforce these rules "strictly or leniently." Schulz v. Serfilco, Ltd., 965 F.2d 516, 519 (7th Cir.1992) (citing Bell, Boyd & Lloyd v. Tapy, 896 F.2d 1101, 1103 (7th Cir.1990)). Despite Treece's non-compliance with Local Rule 12, the court will look to the pleadings, depositions, transcripts, admissions, and affidavits to determine if a genuine issue of material fact exists. See Johnson v. Gudmundson, 35 F.3d 1104, 1116 (7th Cir.1994) (holding that plaintiff's failure to file a 12(N) did not relieve the court of its obligation to determine whether the record established a genuine issue of material fact).

Analysis

I. Motion to Supplement the Record

Treece has filed a Motion to Supplement the Record. In Treece's motion, she moves the court to allow her to supplement the record with her attorney's affidavit. [FN2] The attorney states that he had a discussion with an individual, Ben Zolgar, who was allegedly charged and indicted based on false statements made by Hochstetler. (Pl.'s Mot. to Supp. Rec., Ex. 1.) Treece submits this affidavit to show proof that Hochstetler had fabricated charges against other individuals. The statements made by Treece's counsel in his affidavit go to the truth of the matter asserted and are inadmissable hearsay. See Fed.R.Evid. 802. Evidence relied upon for a motion for summary judgement "must be competent evidence of a type otherwise admissible at trial." Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir.1996). Thus, Treece may not rely upon her counsel's affidavit to oppose Defendants' Motion

for Summary Judgment. Id. Therefore, Treece's Motion to Supplement the Record is denied.

> FN2. Treece also seeks to supplement the record with transcripts from Patricia Shetina's and Majorie Dalton's deposition testimony. The court notes that defense counsel has already provided these transcripts; therefore, they are already part of the record.

II. Malicious Prosecution Under § 1983

Section 1983 creates a federal cause of action for "the deprivation, under color of state law, of a citizen's rights, privileges, or immunities secured by the Constitution or laws of the United States." Ledford v. Sullivan, 105 F.3d 354, 356 (7th Cir .1997) (quoting Livadas v. Bradshaw, 512 U.S. 107, 132 (1994)). In order to state a claim for malicious prosecution under § 1983, Treece must demonstrate that (1) she suffered a deprivation of constitutional magnitude, (2) the malicious prosecution was committed by state actors, and (3) she satisfies the requirements of the state law cause of action for malicious prosecution. Reed v. City of Chicago, 77 F.3d 1049, 1051 (7th Cir.1996); Smart v. Board of Trustees, 34 F.3d 432, 434 (7th Cir.1994). Defendants challenge Treece's ability to meet the first and third requirements for her malicious prosecution claim under § 1983.

A. Constitutional Violation Under § 1983

The constitutional basis for a malicious prosecution claim under § 1983 is unclear. See Albright v. Oliver, 975 F.2d 343, 344 (7th Cir.1992), aff'd on other grounds, 510 U.S. 266 (1994) (recognizing the "embarrassing diversity of judicial opinion"); Mahoney v. Kesery, 976 F.2d 1054, 1059 (7th Cir.1992) (same). Prior to the Supreme Court's decision in Albright v. Oliver, 510 U.S. 266 (1994), the Seventh Circuit generally analyzed malicious prosecution claims under the due process clause. See, e.g., Mahoney, 976 F.2d at 1060 (analyzing malicious prosecution claim under the due process clause). However, the Supreme Court's questioned this due process analysis in Albright. Garcia v. City of Chicago, 24 F.3d 966, 971 (7th Cir.1994) (noting that Albright "casts considerable doubt on the application of substantive due process").

In Albright, the plaintiff claimed that the defendant officer violated his substantive due process rights to be free from prosecution without probable cause. 510 U.S. at 271. The plurality refused to expand the concept of substantive due process to cover the plaintiff's malicious prosecution claim. Id. at 275. The plurality suggested that the plaintiff's malicious prosecution claim was actionable under the Fourth Amendment, but left open the question because it was not before the Court. Id. at 274-75. In light of Albright, the Seventh Circuit recognized that malicious prosecution claims fall under the Fourth Amendment and not under the due process clause directly. Smart, 34 F.3d at 434; but see, Reed, 77 F.3d at 1051 (stating that the constitutional amendment implicated by a malicious prosecution "remains somewhat unclear"). The Fourth

Amendment protects individuals from unreasonable searches and seizures. Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (2d Cir.1995), cert. denied, 517 U.S. 1189, 116 S.Ct. 1676 (1996).

The issue before the court is whether being forced to stand trial constitutes a "seizure" under the Fourth Amendment. The Seventh Circuit has only discussed the implications of Albright in dicta and has not clearly articulated what constitutes a Fourth Amendment "seizure" in the context of malicious prosecution claims. See Washington v. Summerville, No. 96-2084, 1997 WL 590102, * 9 (7th Cir. Sept.17, 1997) (holding that plaintiff has simply refashioned his wrongful arrest and excessive force claims into a malicious prosecution claim) [FN3]; Reed, 77 F.3d at 1052-53 (recognizing that the Seventh Circuit has not defined what constitutes a "seizure" under the Fourth Amendment while holding that plaintiff's claim is "nothing more than a time-barred wrongful arrest claim"); Smart, 34 F.3d at 434 (discussing elements of malicious prosecution claim under the Fourth Amendment). In Smart, the court stated that "if malicious prosecution ... is committed by state actors and results in the arrest or other seizure of the defendant, there is an infringement of liberty ... under the Fourth Amendment." 34 F.3d at 434. However, in Reed, the Seventh Circuit questioned this analysis. Reed recognized that Smart did not discuss what constituted the "other seizure," nor did Smart address prior Seventh Circuit case law rejecting the notion of a "continuing seizure." Reed, 77 F.3d at 1052; see also, Wilkins v. May, 872 F.2d 190, 194 (7th Cir.1989) (rejecting the notion of a "continuing seizure"). More specifically, the seizure of a criminal defendant ends after the

Gerstein hearing, a probable cause hearing conducted after warrant-less arrests. Garcia, 24 F.3d at 971 n. 6 (citing Wilkins, 872 F.2d at 194). [FN4] Therefore, the charge and arrest itself does not constitute a "seizure" in malicious prosecution claims. Singer, 63 F.3d at 117 (holding that plaintiff's arrest occurred prior to any judicial proceedings and therefore could not serve as the predicate deprivation of liberty).

> FN3. Defendants contend that Washington v. Summerville, 127 F.3d 552 (7th Cir.1997) supports their motion for summary judgment. In Washington, the plaintiff claimed that he was beaten by the defendant detectives and forced to make inculpatory statements. Id. at 554. He brought several claims against the defendants, including unlawful arrest, excessive force, and malicious prosecution under § 1983. Id. The court dismissed the plaintiff's malicious prosecution claim because the plaintiff failed to show that his criminal case was terminated in his favor. Id. at 558. In dicta, the court further stated that the plaintiff's claim was "virtually identical" to the plaintiff's claim in Reed. Id. at 559. The plaintiff alleged that the defendants filed false reports because "[they] did not note his illegal arrest and coerced confession in their reports and that the reports were used to bring charges against him." Id. He also alleged that defendants testified falsely at the grand jury and his motion to suppress hearing because "they failed to mention his unlawful arrest and his coerced confession." Id. The court stated that these allegations go to the "heart of Washington's wrongful arrest and excessive force

claims." Id. The court also noted that Washington only included these allegations in his conspiracy count that was dismissed and not contested on appeal. Washington did not include these allegations in his false arrest, excessive force, or malicious prosecution claims. Despite Defendants reliance on Washington, the court finds that Washington is distinguishable from this case. Treece claims that Defendant Hochstetler actually fabricated the charges against her with the intention of having her prosecuted. The court in Washington noted that the detectives' role in the case was in effectuating and maintaining the seizure, not in initiating and pursuing the criminal prosecution. Id. at 559-60. Furthermore, the court's analysis is dicta because it found that Washington failed to prove that his criminal case was terminated in a manor indicative of his innocence.

FN4. Justice Ginsburg noted in her concurrence in Albright that

A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant released pretrial is not still "seized" in the constitutionally relevant sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial so long as he is bound to appear in court and answer the state's charges. He is equally bound to appear, and is hence "seized" for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to

secure his presence in court.

510 U.S. at 279. Reed questioned that Albright may have blurred the analysis in Wilkins, but stated that this was not the case to struggle with Albright. Reed, 77 F.3d at 1052-53; see also, Garcia, 24 F.3d at 975 (Cudahy, J. concurring) (acknowledging that Albright "potentially blurs the bright line [the court] ha[s] drawn"); Gonzales v. City of Chicago, 888 F.Supp. 887, 890 n. 3 (N.D.Ill.1995) (recognizing that the continuing viability of the Wilkins rule is unclear). However, in Washington, the court reiterated that it has rejected the concept of a "continuing seizure." 127 F.3d at 560 n. 3 (citing Wilkins, 872 F.2d at 193); see also, Riley v. Dorton, 115 F.3d 1159, 1162 (4th Cir.1997) (rejecting "continuing seizure" approach to § 1983 excessive force claims); Whiting v. Taylor, 85 F.3d 581, 584 (11th Cir.1996) (expressing concerns about "continuing seizure" approach to § 1983 malicious prosecution claim without deciding the issue). In Washington, the court noted that the concept of "continuing seizure" would "change when a cause of action would accrue. The limitations' period would not begin to run until the accused was released from custody." 127 F.3d at 560 n. 3.

The Second Circuit has provided a compelling definition of what constitutes a seizure in malicious prosecution claims that is consistent with Seventh Circuit case law. The Second Circuit has held that the deprivation of liberty, or the "seizure," must have been effected "pursuant to the legal process." Singer, 63 F.3d at 117

(quoting Heck v. Humphrey, 512 U.S. 477, 484 (1994)). It is the legal proceeding itself that constitutes the "seizure." Legal proceedings may begin any number of ways: the issuance of a warrant, the filing of an indictment or other formal charge, the holding of an arraignment or preliminary hearing, or the holding of a trial. Murphy v. Lynn, 118 F.3d 938, 944 (2d Cir.1997).

In this case, Treece was compelled to endure two criminal trials. [FN5] These legal proceedings constitute a "seizure" under the Fourth Amendment. Murphy, 118 F.3d at 946; Willner v. Town of North Hempstead, No. CV 96-2311, 1997 WL 566866, *6 (E.D.N.Y. Sept.11, 1997); see also, Mahoney, 976 F.2d at 1060 (recognizing that attendance at trial is a standard condition of bail); Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 301 (1984) (in habeas corpus context, individual released on his own recognizance remains in official custody because of an "obligation to appear for trial"); but see, Gallo v. City of Philadelphia, 975 F.Supp. 723, 731 (E.D.Pa.1997) (having to appear for arraignment and trial and restrictions on travel are not constitutional deprivations under the Fourth Amendment).

> FN5. Treece also contends that her malicious prosecution claim rises to the level of a constitutional wrong because she was subjected to an illegal search. However, the only evidence of an illegal search in the record is Hochstetler's search of the Treece home related to the theft charges against Otis Treece. Treece has presented no evidence as to how this search is related to her claim for malicious prosecution, nor has Plaintiff presented any other

evidence of an illegal search.

Defendants also argue that an adequate state remedy exists for Treece's malicious prosecution claim. (Defs' Mem. at 3.) In Monroe v. Pape, 365 U.S. 167(1961), the Supreme Court rejected this argument. Id. at 183 (stating that it is not necessary for plaintiff to exhaust state remedy when one is available); see Crane v. Gasparim, 719 F.Supp. 746, 747 (N.D.Ill.1989) (same). Defendants' argument would effectively eliminate constitutional protections under § 1983 for malicious prosecutions because one of the elements of a § 1983 malicious prosecution claim is that the state law requirements are met. In cases where the plaintiff is not "seized" pursuant to some legal process, the plaintiff will not have a cognizable claim under § 1983, but may have an adequate state law remedy.

B. Malicious Prosecution Under Illinois Law

The court must determine if Treece has set forth sufficient facts to fulfill the third requirement for a malicious prosecution claim under § 1983, which requires the plaintiff to meet all of the elements of a malicious prosecution claim under Illinois law, Reed, 77 F.3d at 1051; Smart, 34 F.3d at 434. In order to prevail on a malicious prosecution claim under Illinois law, the plaintiff must prove the following:

> (1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant; (2) termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such a proceeding; (4) the presence of malice; and (5) damages resulting to the plaintiff.

Swick v. Liautaud, 662 N.E.2d 1238, 1242 (Ill.1996); Meerbrey v. Marshall Field & Co., 564 N.E.2d 1222, 1231 (Ill.1990). Defendants contend that the nolle prosequi was not a termination in favor of Treece and that Hochstetler had probable cause to file charges against Treece for intimidation.

1. Termination of Proceedings in Favor of Plaintiff

The first issue before the court is whether the nolle prosequi of Treece's charges constitutes a termination of the proceedings in her favor. "A nolle prosequi is not a final disposition of a case but is a procedure [that] restores the matter to the same state which existed before the Government initiated the prosecution." Washington, 1997 WL 590102, * 6. Generally, a prosecutor's formal abandonment of a criminal proceeding via a nolle prosequi is a termination in favor of the accused, unless the abandonment is for reasons "not indicative of the innocence of the accused." Swick, 662 N.E.2d at 1242; Joiner v. Benton Community Bank, 411 N.E.2d 229, 232 (Ill.1980). Such an abandonment is not indicative of the accused's innocence

> when the nolle prosequi is the result of an agreement or compromise with the accused, misconduct on the part of the accused for the purpose of preventing trial, mercy requested or accepted by the accused, the institution of new criminal proceedings, or the impossibility or impracticability of bringing the accused to trial.

Swick, 662 N.E.2d at 1243. The court looks to the circumstances surrounding the abandonment of the criminal

proceedings. Id. at 1242. The plaintiff has the burden of showing that the nolle prosequi was entered for reasons consistent with the plaintiff's innocence. Id.

In this case, Defendants argue that the Assistant State's Attorneys entered the nolle prosequi because of a compromise that Treece would not bring a civil suit against the City. [FN6] The record contains inconsistencies as to whether Treece's defense counsel entered into such an agreement. In Plaintiff's Answers to Defendants' Requests for Admissions, Treece admits that her defense attorneys entered into a plea agreement in exchange for the nolle prosequi of the charges against her. (Defs.' Ex. L ¶ 30.) However, Treece later states that her defense attorneys told the prosecutors that they would not pursue a civil suit against the City, but this was in no way related to the nolle prosequi of the charges. (Pl.'s 12(N) ¶ 52.) Furthermore, Treece submits additional evidence to support her assertion that her defense attorneys did not make an agreement with the prosecutors. Treece's defense counsel testified that no such agreement was ever made. (Zellner at 13-15.) Her defense counsel also testified that the Assistant State's Attorneys requested a nolle prosequi of the case because they did not think they could win and because the police department was taking disciplinary action against Hochstetler. (Zellner at 12, 15, 24.) Additional evidence in the record supports Treece's contention that the prosecutors requested the nolle prosequi for other reasons. Assistant State's Attorney Joseph Birkett ("Birkett"), who was assigned to the case, articulated several reasons for the motion to nolle prosequi the case. He stated that the third trial would likely result in a bench trial and a finding of not guilty and that the police department had initiated

disciplinary proceedings against Hochstetler for filing false reports. (Birkett at 36-37.) In light of all of the the inconsistencies in the record, the court finds that a genuine issue of material fact exists as to whether the nolle prosequi was entered for reasons indicative of Treece's innocence. See South Central Bank and Trust Co. v. Citicorp Credit Serv., Inc., 863 F.Supp. 635, 643 (N.D.Ill.1994) (holding that the court may not exclude consideration of other evidence in the record simply because of a conflict with prior testimony.) A reasonable jury could infer that the Assistant State's Attorneys requested the nolle prosequi order because they lacked reasonable grounds to pursue the criminal prosecution.

> FN6. Plaintiff attempts to argue that such an agreement violates Illinois law. Plaintiff does not raise the argument in her Memorandum in Opposition to Defendants' Motion for Summary Judgement, but in her 12(N) in response to Defendants' 12(M). The argument is not properly before the court. Therefore, the court will not consider the argument.

2. Probable Cause For Intimidation Charge

Defendants argue that Hochstetler had probable cause to charge Treece with intimidation. An officer will be immune from liability if the officer had probable cause for the arrest or if the officer reasonably believed that the person committed the offense. Booker v. Ward, 94 F.3d 1052, 1057 (7th Cir.1996), cert. denied, 117 S.Ct. 952, (1997). Moreover, a grand jury indictment or judicial determination of probable cause in a criminal prosecution

may constitute prima facie evidence of probable cause. See Zisisv v. St. Joseph Township of Allen County, No. 1:96 CV 183, 1997 WL 610058, * 8 (N.D.Ind. Aug, 25, 1997) (judicial determination); Jerricks v. Bresnahan, 880 F.Supp. 521, 524 n. 2 (N.D.Ill.1995) (grand jury indictment). A plaintiff may rebut this presumption by providing evidence that the officer deliberately supplied misleading or false information which induced the finding of probable cause, the grand jury's decision to indict, or the prosecutor's decision to proceed to trial. Zisisv, 1997 WL 610058, * 8; Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir.1988).

Treece argues that Hochstetler fabricated the police reports and the charges against her and as a result caused her to be indicted, arrested, and tried in two separate jury trials. Treece claims that she never threatened Hochstetler's life, but that Hochstetler solicited a bribe from her in exchange for dropping the theft charges against her husband. (Treece at 80-81, 235.) Defendants argue that Hochstetler had probable cause to charge Treece based on (1) Treece's appearance at Officer Dickson's home; (2) Treece's first conversation with Hochstetler at the train station, where Treece allegedly threatened Hochstetler if he did not drop the charges; (3) subsequent conversations between Treece and Hochstetler, which Defendants insist corroborate Treece's initial threat; (4) Treece's appearance in the police department parking lot; and (5) Treece's encounter with Hochstetler in downtown Naperville at the go-cart races. Both parties present divergent testimony with respect to the occurrence of events leading up to Treece's indictment.

Plaintiff's Appearance at Officer Dickson's Home

Treece testified that her appearance at Officer Dickson's home on September 26, 1991 was completely innocent. Two weeks prior, Treece visited the home, spoke with Officer Dickson, and inquired about whether his home was for sale and who had done the architectural work. (Pl.'s 12(N) ¶ 6.) On September 26, Treece visited the home again and asked Officer Dickson about getting the building plans. (Treece at 66.)

Officer Dickson testified that he had never met Treece before this date. (Defs.' 12(M) ¶ 6.) He also stated that Treece had asked if he was Hochstetler (Defs.' 12(M) ¶ 7), which Treece denies (Treece at 72). Upon leaving the premises, Officer Dickson ran a check on Treece's license plates and called Hochstetler to tell him that Treece had been looking for him. (Defs.' 12(M) ¶ 8.) In response to Treece's appearance at Officer Dickson's home, Hochstetler called Treece at home that evening. (Defs.' 12(M) ¶ 9.) Treece testified that Hochstetler called her at home and requested to meet with her to discuss the charges against Otis. (Pl.'s 12(N) ¶ 10.) They both agreed to meet at the train station the next day. (Pl.'s 12(N) ¶ 10.)

Plaintiff's First Conversation With Hochstetler

On September 27, 1997, Hochstetler and Treece met at the train station as agreed. (Defs.' 12(M) ¶ 13.) Treece testified that during this meeting Hochstetler offered to drop the charges if Treece paid him $100,000. (Treece at 80.) Hochstetler denied ever soliciting a bribe from Treece. (Hochstetler at 123.) Hochstetler testified that

Treece made some reference to "a crime family" and threatened that if he did not drop the charges against her husband harm would come to him and his family. (Hochstetler at 114, 123.) Treece denies that she ever threatened Hochstetler and denies the existence of "a crime family." (Treece at 213, 233-234.) Hochstetler filed a police report later the same day charging Treece with intimidation. (Defs' Ex. U.) After this meeting, Hochstetler applied for an overhear to tape subsequent conversations between him and Treece. (Defs.' 12(M) ¶ 17.) He called Treece on September 29, 1991 to set up another meeting with Treece. (Defs.' 12(M) ¶ 19.) Treece agreed to meet Hochstetler again at the train station. (Defs.' 12(M) ¶ 19.)

After this conversation with Hochstetler, Treece started planning a fundraiser to collect the $100,000. (Treece at 89-93.) Treece discussed the plans to raise the $100,000 with her husband and a friend. (Treece at 89.) They decided to plan a fundraiser at the local VFW hall. (Treece at 89.) Otis later turned himself in at the police department's request. (Treece at 93.) Because Otis turned himself in, they dropped the plans for the fundraiser. (Treece at 93 .)

Subsequent Conversations Between Plaintiff and Hochstetler

On October 1, 1991, Treece and Hochstetler again met at the train station. (Defs.' 12(M) ¶ 20.) Hochstetler wore an overhear during this meeting. (Defs.' Ex. B, C.) Defendants contend that several of Treece's statements during this conversation corroborate Hochstetler's allegation that Treece threatened him and his family.

During their conversation, Hochstetler made several references that he was concerned about his own safety and the safety of his family. Specifically, Hochstetler stated that he was concerned his family might be in danger if he did not "back off." Treece responded, "I don't think your family is in danger, I think it is a fact...." (Defs.' Ex. B at 6.) Later in the conversation, he asked Treece, "[W]hat if I want to go on living in this world?" (Defs.' Ex. B at 18.) She responded, "[t]hen do as much as you can. To [sic] make life good for yourself. We all want to go on living." (Defs.' Ex. B at 18.) Defendants also point out that Treece asked if Hochstetler could make the charges against her husband go away. (Defs.' 12(M) ¶ 28.) Hochstetler responded that he could "if [he] had a big enough reason...." (Defs.' Ex. B at 18.) Treece then responded, "[t]hat's a good reason, right there." (Defs.' Ex. B at 18.) Defendants argue that this last statement by Treece was in direct response to Hochstetler's desire to "go on living in this world." (Defs.' 12(M) ¶ 29.)

Treece admits that she made these statements but denies that her statements indicate that she previously threatened Hochstelter. (Pl.'s 12(N) ¶ ¶ 26-30.) Treece testified that her statement--"I don't think your family is in danger. I think it is a fact...."--is taken out of context. (Treece at 207.) After she made this statement, she went on to say that there are "certain facts in our lives that we have to live with." (Defs.' Ex. B at 6.) She stated that she was implying that his family was not in danger in response to his concern. (Treece at 207.) Treece also testified that they were talking about two different things; she stated that Hochstetler was on "plane Y and [she] was on plane Z...." (Treece at 202.) Treece also asserts that Hochstetler's

statements during their conversation support her contention that Hochstetler offered to drop the charges against her husband in exchange for $100,000. Specifically, Treece points to Hochstetler's statement, "If I have a big enough reason, it's a possibility," suggesting that Hochstetler in fact requested the payment of $100,000. (Pl.'s 12(N) ¶ 28.)

On October 8, 1991, Hochstetler again called Treece and taped their conversation. (Defs.' 12(M) ¶ 33.) During their conversation, Hochstetler stated, "I just want people to know that it's a long road ahead, and if I can't still do something to keep these people off my back, that's fine, you know, I guess the door's still open...." (Defs.' Ex. D at 4.) He again expressed his concern about the safety of his children. (Defs.' Ex. D at 4.) Treece responded that she would express his wishes in that area. (Defs.' Ex. D at 4.) Defendants contend that her statement suggests that she previously threatened Hochstetler. (Defs.' 12(M) ¶ ¶ 36, 37.) Treece, however, testified that she never threatened Hochstetler and she did not know why he was expressing concern about his family's safety. (Treece at 234.) She also testified that she took Hochstetler's statement that "the door's still open" to mean that it was not too late to pay the bribe. (Treece at 234.)

Plaintiff's Appearance in the Police Department Parking Lot

Defendants insist that Treece attempted to further intimidate Hochstetler on October 11, 1991. (Defs' Mem. at 11.) Treece was in the police station parking lot, a restricted area, with a video camera. (Treece at 95.) Treece

testified that she did not see the "no trespassing" sign. (Treece at 95.) She stated that she wanted to film the pile of scrap metal in the parking lot because she thought it would help her husband's criminal case and that she was filming wildlife on the lake adjacent to the parking lot. (Treece at 95-97.) Hochstetler was driving into the parking lot as Treece was driving out. (Hochstetler at 166.) He saw the video camera in her car. (Hochstetler at 166.) He testified that he did not see what she was filming. (Hochstetler at 166.) Hochstetler filed a police report stating that Treece had access to marked and unmarked squad cars and employees' personal vehicles. (Treece, Ex. 3 at 14.)

Plaintiff's Encounter With Hochstetler in Downtown Naperville

Defendants further argue that Treece confronted Defendant two days later. (Defs' Mem. at 11.) On October 13, 1991, Treece was in downtown Naperville during a go-cart race. (Treece at 100.) Treece testified that she was taking pictures of the event with a still camera. (Treece at 100-01.) Hochstetler testified that he was suspicious about Treece being in close proximity to him and his family. (Hochstetler at 178.) He requested another officer to talk to her while he left the area with his family. (Hochstetler at 179.) However, he stated that he did not notice her taking pictures. (Hochstetler at 179.) Hochstetler filed another police report alleging that Treece was trying to take pictures of him and that "at least twice [she] attempt[ed] to gain a clear shot of [him]." (Treece, Ex. 3 at 16.) Hochstetler's testimony conflicts with what was written in the police report.

The factual disputes in this case raise a genuine issue of material fact for a jury. A reasonable jury could find that Hochstetler fabricated the initial police report against Treece, that he solicited a bribe from her, that he intentionally phrased his statements and questions to make it look like Treece had threatened him, and that he falsified subsequent police reports in Treece's case. As a result, a jury could find that Hochstetler did not have probable cause to charge Treece with intimidation and intentionally fabricated the charges against her.

III. Qualified Immunity

Defendants argue that Hochstetler is entitled to qualified immunity under § 1983. Qualified immunity is an affirmative defense in which the defendant carries the burden of proof. Gomez v. Toledo, 446 U.S. 635, 640 (1980); Kompare v. Stein, 801 F.2d 883, 886 (1986). "Qualified immunity shields government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " Kompare, 801 F.2d at 886 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). If a reasonable officer could have believed his conduct to be unlawful in light of clearly established law, the officer is not entitled to qualified immunity. Anderson v. Creighton, 483 U.S. 635, 641 (1987). Even though facts may be in dispute, the issue of qualified immunity is always one for the court to decide. Jones, 856 F.2d at 969. The court must look to the particular facts of the case and how the plaintiff has characterized the defendant's actions in accordance with these facts. Rakovich v. Wade, 850 F.2d 1180, 1201 (7th

Cir.1988). The court then compares the plaintiff's characterizations of the facts with the law at the time the offense occurred to determine if the defendant's actions violated clearly established law. Id. at 1209. The Seventh Circuit has invoked a two part test: "(1) Does the conduct set out a constitutional violation? and (2) were the constitutional standards clearly established?" Id. at 1210 (quoting Wade v. Hegner, 804 F.2d 67, 70 (7th Cir.1986)).

Defendant Hochstetler insists that he is entitled to qualified immunity because the charges against Treece "were reasonable in light of established law and were based upon probable cause to believe she had committed the offense." (Def.'s Mot. at 13.) However, Treece alleges that Hochstetler fabricated the charges and falsified police reports, which violate clearly established law. See Jones, 856 F.2d at 994 (holding that an officer cannot escape liability if he is instrumental in causing plaintiff's prosecution based on false reports). In light of the evidence, the court finds that Treece's allegations are plausible. Hochstetler or a reasonable officer could have understood that falsifying police reports and fabricating charges violated Treece's rights under the Fourth Amendment. See McGrath v. Gillis, 44 F.3d 567, 570 (7th Cir.1995) (holding that if reasonable officer could have realized that the officer's conduct violated clearly established law, then officer is not qualifiedly immune). Therefore, Hochstetler is not entitled to qualified immunity.

IV. Malicious Prosecution Against the City

The City requests this court to grant summary

judgment in its favor. Municipalities cannot be held liable for violations of § 1983 solely on the theory of respondeat superior liability. Monell v. Department of Social Serv., 436 U.S. 658, 691 (1978). However, municipalities may be subject to liability where the plaintiff's injury resulted from a municipal custom, policy, or practice. Id.; Strauss v. City of Chicago, 760 F.2d 765, 767 (7th Cir.1985). Generally, a custom "implies a habitual practice or course of action that characteristically is repeated under like circumstances." Sims v. Mulcahy, 902 F.2d 524, 542 (7th Cir.1990). Even if the practice lacks formal approval, a municipality may be liable if it is a persistent and widespread practice. Monell, 436 U.S. at 690-91. Therefore, the issue before the court is whether the City had a custom, policy, or practice of permitting its officers to file false reports.

Treece points to three different cases in support of her contention that the City had a policy and practice of permitting its officers to file false reports and false allegations against individual citizens: Patricia Shetina ("Shetina"), Majorie Dalton ("Dalton"), and Merrill Shepro ("Shepro").

Shetina

Hochstetler was assigned to investigate a robbery at Shetina's Naperville store. She testified that Hochstetler falsely accused one of her employees without justification. (Shetina at 13-14.) She felt that the employee was innocent and that Hochstetler mishandled the case. (Shetina at 12, 16.) The Chief of Police, David Dial, testified that no charges were ever filed against Shetina or her employee.

(Dial at 135.) However, two officers, who were assigned to the case under Hochstetler's command, were disciplined for falsifying a police report in the case. (Dial at 100-01.) The police report stated that adjoining shop owners had been canvassed about the robbery. (Shetina at 20-25.) However, when Shetina talked to the shop owners, they stated that no police officers had talked to them. (Shetina at 20-25.) She then filed a complaint with the department about the false report. (Shetina at 20-25.) The department investigated the allegations and disciplined the officers. (Dial at 100-01.)

Dalton

Dalton's case involved an arson incident in her garage. Hochstetler was assigned to the scene. She testified that while the fire was blazing in her garage, Hochstetler took her son back into the house, questioned him, and accused him of setting the fire. (Dalton at 42, 64.) She filed charges with the department against Hochstetler. (Dalton at 44.) She also stated that she found falsifications on the police report. (Dalton at 44.) During the deposition, she stated that the report incorrectly stated her son's place of birth and age, but could not remember the other false information contained in the report. (Dalton at 44.) A note was found at the scene of the fire. (Dalton at 77.) Hochstetler subpoenaed her and her son to give handwriting exemplars and finger prints. (Dalton at 77, 88.) No charges were ever filed against her or her son. (Dial at 135.)

Shepro

Treece alleges that Shepro was maliciously prosecuted as a "result of Defendant Hochstetler's actions." (Pl.'s 12(N) ¶ 53.) It is not clear what the circumstances were regarding the criminal case against Shepro and there are only slight references in the record. Treece testified that Shepro was prosecuted and Hochstetler authored false reports in his case. (Treece at 128.) The Chief of Police stated in his deposition that the reports in the Shepro case were untruthful. (Dial at 133.) Treece's defense counsel, prior to the nolle prosequi of the charges, received information about the Shepro case and got the impression that Hochstetler was in trouble as a result of the case. (Zellner at 23-27.)

Although the evidence in the record barely supports Treece's contention that the City had a policy or practice of allowing its officers to file false reports, the court must view the facts in the light most favorable to the plaintiff to determine if summary judgment should be denied. Bratton, 77 F.3d at 171 (citation omitted); Sullivan, 78 F.3d at 325 (citation omitted). The record suggests that officers in the Naperville Police Department have a tendency to author false statements. The record also suggests that Hochstetler has a tendency to wrongly accuse individuals. Moreover, the City was aware of these facts through prior disciplinary procedures and prior complaints brought by Shetina and Dalton. The record further suggests that Hochstetler may have filed false reports in the Shepro case that resulted in Shepro's criminal prosecution. Based an this evidence, a reasonable jury could find that the City had a policy or practice of permitting its officers to file false reports. See

Powe v. City of Chicago, 664 F.2d 639, 651 (7th Cir.1981) (holding that plaintiff had shown a widespread practice for an unlawful arrest claim by showing that there were deficiencies in warrants on four separate occasions). Therefore, the City's motion for summary judgment is denied.

V. Attorney's Fees

Defendants urge the court to strike Treece's claim for recovery of attorney's fees from her criminal trial. (Defs' Mot. at 15.) A plaintiff may recover "attorney's fees in a state criminal action where the expenditure is a foreseeable result of the acts of the defendant." Sherwin Manor Nursing Home Ctr., Inc. v. McAuliffe, 37 F.3d 1216, 1222 (7th Cir.1994) (quoting Kerr v. City of Chicago, 424 F.2d 1134, 1141 (7th Cir.1970)). In malicious prosecution claims under § 1983, a jury may award attorney's fees from a plaintiff's criminal trial when the officer provided false information to the prosecutor. Sloman v. Tadlock, 21 F.3d 1462, 1474 (9th Cir.1994).

In this case, Treece claims that Hochstetler filed false police reports and made false statements that were instrumental in her criminal prosecution. As a result, she was forced to stand trial on two separate occasions. As previously discussed under the court's probable cause analysis, a reasonable jury could conclude that Hochstetler knowingly provided false information to the prosecutors in Treece's criminal case. Therefore, the court will not strike Treece's request for attorney's fees from her criminal trial.

VI. Intentional Infliction of Emotional Distress

Under Illinois law, the elements of a cause of action for intentional infliction of emotional distress are as follows:

> First, the conduct involved must be truly extreme and outrageous. Second, the actor must either intend that his conduct inflict severe emotional distress, or know that there is at least a high probability that this conduct will cause severe emotional distress. Third, the conduct must in fact cause severe emotional distress.

Harriston v. Chicago Tribune Co., 992 F.2d 697, 702 (7th Cir.1993) (citing McGrath v. Fahey, 533 N.E.2d 806, 809 (Ill.1988)).

The first element, the element of extreme and outrageous conduct, is judged by an objective standard based on all the facts and circumstances of a particular case. Doe v. Calumet City, 641 N.E.2d 498, 507 (Ill.1994) (citing McGrath, 533 N.E.2d 806). "The liability clearly does not extend to mere insults, indignities, threats, annoyance, petty oppression or trivialities . . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond the bounds of decency." Whitehead v. AM Int'l, Inc., 860 F.Supp. 1280, 1290 (N.D.Ill.1994) (quoting Public Finance Corp. V. Davis, 360 N.E.2d 765, 767 (Ill.1977)). One "substantial factor" in evaluating the outrageousness of the conduct is whether the defendant was in a position of power and whether the defendant abused that power. McGrath, 533 N.E.2d at 810; see also, Doe, 641 N.E.2d at 508 (officer's position of power contributed

to the outrageousness of the conduct). A reasonable jury could find that falsifying police reports and forcing an individual to endure the stress of not one, but two criminal trials, is extreme and outrageous and goes beyond the "bounds of decency."

For the second element, the plaintiff must show that the defendant intended to cause or recklessly disregarded the probability that his actions would cause emotional distress. Harriston, 992 F.2d at 702. The reasonableness of the defendant's actions may depend on the relevant rule of law. McGrath, 533 N.E.2d at 810. As previously discussed, it is unlawful for an officer to file false reports and make false allegations causing an individual to be criminally prosecuted. Jones, 856 F.2d at 994. A reasonable jury could find that Hochstetler filed false reports against Treece and caused her to be criminally prosecuted and that he intended to cause her emotional distress or could have reasonably believed that his conduct would have caused her emotional distress.

Finally, for the third element, the plaintiff must prove that the defendant's actions caused severe emotional distress. Harriston, 992 F.2d at 702. Treece claims that she suffered severe emotional distress, which is evidenced by the worsening of her eye condition, ocular histoplasmosis. (Pl.'s 12(N) ¶ 86.) A clinical psychologist testified that emotional distress can trigger histoplasmosis, but that it does not cause the condition. (Ettner at 21.) A cause "is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury." Doe, 641 N.E.2d at 509. Similarly, the mere fact that a plaintiff may have a pre-existing condition or susceptibility

to emotional distress does not necessarily preclude liability. Alsteen v. Gehl, 124 N.W.2d 312, 318 (Wis.1963). While Treece is not required to show physical injury or physical manifestations of emotional harm, McCaskill v. Barr, 414 N.E.2d 1327, 1328 (Ill. App. 4th Dist.1980), a genuine issue of material fact exists as to whether Treece suffered severe emotional distress.

Defendants' attempt to argue that Treece did not suffer severe emotional distress, as evidenced by the fact that Treece first sought psychological treatment on October 25, 1995 at the advice of her attorney, (Treece at 236). This does not undermine the fact that Treece suffered physical manifestations of the emotional stress she was under. Moreover, her psychologist testified that it was her conclusion that Treece suffered emotional distress as a result of the events involving Defendant Hochstetler. (Ettner at 38.) A reasonable jury could conclude that Hochstetler's conduct was extreme and outrageous, that his conduct was intentional, and that Treece suffered severe emotional distress. Therefore, the court denies defendants' motion for summary judgment on Treece's Intentional Infliction of Emotional Distress claim.

Conclusion

For the reasons set forth above, the court denies Plaintiff Treece's Motion to Supplement the Record and Defendants' Motion for Summary Judgment. The parties are instructed to discuss settlement before the next date scheduled in this case.

ENTER:

/s/ Ann Claire Williams,
Ann Claire Williams,
Judge

Dated: March 24, 1998

United States District Court, N.D. Illinois.

Naomi TREECE, Plaintiff,
v.
CITY OF NAPERVILLE, a Municipal Corporation, et al., Defendants.

No. 94 C 5548.

June 30, 1998.

MEMORANDUM OPINION AND ORDER

WILLIAMS, J.

Defendants move this court to reconsider its March 24, 1998 Memorandum Opinion and Order ("opinion") denying Defendants' motion for summary judgment. For the reasons stated below, the court denies defendants' motion to reconsider.

Analysis

In their motion to reconsider, defendants raise three main arguments. Defendants argue that: 1) plaintiff's malicious prosecution claim is not actionable under § 1983 against Detective Hochstetler; 2) plaintiff has failed to establish a constitutional deprivation to support her § 1983 claim; and 3) the evidence does not support a finding of municipal liability. The court will address each of these arguments in turn.

I.

First, defendants claim that under Washington v. Summerville, 127 F.3d 552 (7th Cir.1997), cert. denied, 118 S.Ct. 1515 (1998), Plaintiff Treece can not maintain a Section 1983 malicious prosecution claim against a police officer, but only against a prosecutor. (Defs'. Mot. at 2, 4.) Defendants also assert that the facts in this case are identical to the facts in Washington, and, therefore, summary judgment in defendants' favor is proper. (Id. at 3.) Defendants also urge the court to consider Sterling v. Kazmierczak, 983 F.Supp. 1186 (N.D.Ill.1997), as an example of how courts in this district have followed Washington' s purported holding that only prosecutors can be subject to § 1983 malicious prosecution claims.

After carefully reviewing Washington again and Sterling, the court concludes that defendants' discussion of Washington is inaccurate for the following reasons. First, nowhere in Washington, does the Seventh Circuit hold that a § 1983 malicious prosecution claim can only be maintained against a prosecutor. Rather the Washington court held that, on its facts, "Washington's reliance on a malicious prosecution claim against the detectives is misplaced. In her concurrence in Albright v. Oliver, Justice Ginsburg explained that a malicious prosecution claim against police officers is an anomaly. 510 U.S. 266, 279 n. 5 (1994). She reasoned that the principal player in carrying out a prosecution is not the police officer, but the prosecutor. Id. The detectives' role in [Washington's] case was in effectuating and maintaining a seizure, not in initiating and pursuing a criminal prosecution." Washington, 127 F.3d at 559-60. Washington's allegations

did not cross the line from the realm of simply effectuating and maintaining a seizure to the realm of initiating and pursuing a criminal prosecution. Although Washington alleged that the officers filed false reports and provided false testimony, the false nature of the testimony turned on their omissions rather than any affirmative misrepresentations. The officers did not note Washington's illegal arrest and coerced confession in their reports nor testify about the illegal arrest and coerced confession. Furthermore, Washington introduced these allegations in his conspiracy count, which had been dismissed, not in his malicious prosecution claim. Id. at 559.

In Sterling, the district court reached the same result as in Washington, however, not because of the purported holding that a plaintiff can not maintain a § 1983 malicious prosecution claim against a prosecutor, but rather because plaintiff failed to allege any facts that removed the case from the realm of simply effectuating an arrest to the realm of initiating and pursuing a criminal prosecution. Sterling, 983 F.Supp. at 1191. The court held that "[a]bsent allegations that a police officer committed an improper act after arresting the defendant, the officer is not liable for malicious prosecution and, by extension, is not liable for a section 1983 claim based on malicious prosecution." Id. The plaintiff failed to allege that the officer was involved in the prosecution of the criminal case. He simply questioned whether the officer had probable cause to arrest him and take him into custody. Id.

Additionally, after Washington, courts in this district have repeatedly denied motions to dismiss section 1983 claims against police officers because, unlike Washington,

the plaintiffs successfully plead facts that the defendant-officers initiated and pursued the criminal prosecution against them. See Womack v. Aguirre, No. 97 C 6020, 1998 WL 249228,*2 (N.D.Ill. May 11, 1998) (Womack alleged that the officers prepared false reports, made false statements to prosecutors, and one officer falsely testified at the preliminary hearing; court found that these allegations go beyond the allegations in Washington); Salto v. Mercado, No. 96 C 7168, 1998 WL 142397,*2 (N.D.Ill. March 24, 1998) (Salto alleged that two officers falsely charged him and affirmatively lied in court after his arrest; court found these allegations were not like the allegations in Washington and denied the motion to dismiss as to this malicious prosecution count); DelValle v. Rodriguez, No. 96 C 8089, 1997 WL 695710,*6 (N.D.Ill. Oct. 31, 1997) (unlike Washington, the plaintiff alleged that the defendant-officer gave false testimony at the preliminary hearing and at trial; these allegations go beyond allegations in Washington, accordingly, the court denied the motion to dismiss).

In this case, defendants liken the facts to Washington and Sterling and state that Defendant Hochstetler did nothing more than investigate the intimidation charge against plaintiff. There is no evidence that Hochstetler either arrested plaintiff or committed an improper act after plaintiff's arrest (Defs.' Mot. at 4); therefore, as a matter of law, plaintiff's Section 1983 claim must fail. Treece, on the other hand, has set forth facts that Defendant Officer Hochstetler did more than simply effectuate her arrest, he also fabricated the charge and evidence against her, lied to the grand jury in order to get the indictment, and continued to perjure himself at the trials. (See Pl.'s Resp. at 4; opinion

at 13-14 n .3.) Therefore, the court concludes that Plaintiff Treece has demonstrated that there is a genuine issue regarding Defendant Hochstetler's conduct after Treece's arrest that must be resolved by the trier of fact.

II.

In their motion to reconsider, defendants also argue that plaintiff has failed to establish a constitutional deprivation to support her § 1983 malicious prosecution claim. Defendants rely on the decision in Spiegel v. Rabinovitz, 121 F.3d 251, 256 (7th Cir.), cert. denied, 118 S.Ct. 565 (1997), that Spiegel's deprivations were not of a constitutional magnitude. Defendants then simply conclude that because Spiegel stood trial and the court found that his deprivations were not of a constitutional magnitude, Treece, who also stood trial, failed to allege a constitutional deprivation under the Fourth Amendment as well. (Defs.' Mot. at 6.)

However, on closer examination, Spiegel is limited to its facts. One day, Spiegel and his family were disturbed by noise from the apartment above them. First, his wife went to speak with the upstairs tenants. She soon became involved in an argument with them. Overhearing, Spiegel quickly went upstairs. The female tenant threatened that her common law husband would kill Spiegel. Her husband then struck Spiegel in the back, and she also hit him. Spiegel never laid his hands on either of the tenants. Spiegel then reported the incident to the police and filed criminal complaints against the couple, charging them with battery. When the couple learned of these charges, they in turn filed criminal battery complaints against Spiegel.

Spiegel was then booked, fingerprinted, and placed in a cell for over an hour before he posted bond and was released. When faced with these two cases, the Assistant State's Attorney, Daniel Rabinovitz, did some follow-up investigative work and submitted his recommendation to the State's Attorney's Office (the "office") as to what case the office should pursue. The office decided to pursue the case against Spiegel. During this period, Spiegel claims that he was evicted, his employment status was "adversely affected", and he continues to lose income. Spiegel was tried and acquitted. He then filed a § 1983 malicious prosecution claim against Rabinovitz. 121 F.3d at 253-54.

Spiegel alleged that his subsequent eviction, adverse employment status, and loss of income were deprivations of constitutionally protected property interests which raised his state-law malicious prosecution claim to that of a constitutional tort. Relying on Smart v. Board of Trustees of the University of Illinois, 34 F.3d 432 (7th Cir.1994), cert. denied, 513 U.S. 1129 (1995), the Spiegel court rejected this argument and held that "[a]lthough Spiegel's circumstances are unfortunate, the rationale of Smart instructs that none of them are deprivations of property of a constitutional magnitude. In Smart, the court concluded that "[i]f malicious prosecution or abuse of process is committed by state actors and results in the arrest or other seizure of the defendant, there is an infringement of liberty. . . ." 34 F.3d at 434. In other words, "[i]f liberty is not at stake, it is difficult to see how [malicious prosecution] could be thought to invade an interest protected by the due process clause (life, liberty, or property) merely by virtue of its effect on the reputation or, like any suit, the pocketbook of the defendant." Id. at 434.

Some district courts have held that standing trial does not constitute a deprivation of liberty for purposes of a malicious prosecution claim, see e.g., DuFour-Dowell v. Cogger, 980 F.Supp. 955, 956 (N.D.Ill.1997). However, in her concurrence in Albright v. Oliver, Justice Ginsburg asserted that a party is "seized" in a constitutional sense "so long as he is bound to appear in court and answer the court's charge." 510 U.S. 266, 279 (1994). [FN1] Justice Ginsburg stated:

> FN1. The court recognizes that court's in other districts have rejected Justice Ginsburg's view of a Fourth Amendment seizure. See e.g., Gallo v. City of Philadelphia, 975 F.Supp. 723, 728 (E.D.Pa.1997).

> A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject . . . to the condition that he seek formal permission before the court . . . before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional drain of preparing a defense.

Id. at 278. In this case, Treece did not merely stand trial. Rather, Treece stood trial twice on intimidation charges, and began preparing for a third trial. Furthermore, Treece was forced to sell her home to defend against these charges and was subject to travel restrictions as a condition of bond.

Unlike Spiegel who grounded the purported constitutional aspect of his section 1983 claim in basic pocketbook interests, Treece has grounded her § 1983 claim in the fact that she was "seized" when she was forced to appear in court and answer the court's charges twice and, therefore, deprived of her liberty interests. Accordingly, the court rejects defendants' argument that Treece has articulated no constitutional basis for her § 1983 malicious prosecution claim.

III.

Finally, defendants argue that the evidence does not support a finding of municipal liability under Bryan County v. Brown, 117 S.Ct. 1382 (1997). In Brown, the Supreme Court held that "it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged. That is a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." Id. at 1388. In other words, "[a] plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." Id. at 1392.

The question presented by defendants' motion to reconsider is whether plaintiff has demonstrated that there is a genuine issue of material fact regarding whether the City was the 'moving force' behind plaintiff's injury and,

therefore, deliberately indifferent to the risk that a violation of a particular constitutional or statutory right would follow their decision to allow Hochstetler to continue investigating Treece.

Defendants argue that plaintiff has not met her burden. Defendants claim that there is no evidence that supports the conclusion that falsifying police reports is either a formally approved policy or a widespread custom or practice in the City of Naperville. (Defs.' Mot. at 9.) In response, plaintiff asserts that she has presented facts that strongly suggest that the City of Naperville has a practice of permitting officers to falsify police reports.

In her response, plaintiff submits a January 19, 1983 Naperville Police Memorandum regarding Officer Hochstetler. In the memorandum, Lieutenant Dean M. Gilver summarizes that Hochstetler "is portraying a posture of non-conformity and ignores the direction and tutoring of his supervisors . . . His general attitude can be described as a person who does what he wants to do, when he wants to do it and does not conform to the direction, policy or high standards expected of all officers of this department." (Pl.'s Ex. 2.) Alone, this document suggests that the City condemns officers who do not conform to department standards. [FN2]

> FN2. If Plaintiff Treece had simply submitted this memo, the court would have to conclude that plaintiff has failed to create an issue about whether the City had a practice of permitting officers to file false reports.

However, on May 11, 1998, Plaintiff Treece filed an unopposed motion to supplement the record on the motion to reconsider with newly discovered evidence. [FN3] The newly discovered evidence includes 170 pages of Naperville Police Reports, primarily authored by Officer Hochstetler regarding an investigation, beginning on October 30, 1998, of Ben Zolgar for arson. In plaintiff's April 22, 1997, motion for issuance of subpoenas duces tecum, plaintiff states that Ben Zolgar advised plaintiff's counsel that these police reports are replete with lies and falsehoods.

FN3. On June 12, 1998, the court issued a minute order granting plaintiff's unopposed motion.

After considering plaintiff's recently filed motion to supplement the record, the Shepro, Shetina, and Dalton cases discussed in the court's opinion (opinion at 35-38), as well as the January 1983 memorandum about Hochstetler, the court again concludes that Plaintiff Treece has set forth enough facts to create a genuine issue for trial regarding the City's alleged practice of allowing officers to author false police reports. After considering these facts in the light most favorable to plaintiff, the court finds that a jury could find that the City was deliberately indifferent to the risk that a person could suffer some constitutional harm because officers authored false police reports.

Conclusion

For the reasons stated above, the court denies defendants' motion to reconsider.

ENTER:

s/ Ann Claire Williams
Ann Claire Williams,
Judge

Dated: June 30, 1998

Supreme Court, U.S.
FILED
SEP 25 2000
CLERK

(2)

No. 00-238

In The

Supreme Court of the United States

NAOMI TREECE,

Petitioner,

v.

STEVEN HOCHSTETLER and
CITY OF NAPERVILLE, ILLINOIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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ARGUMENT

I. REASONS FOR DENYING THE WRIT

In late 1991, Naomi Treece's ("Petitioner") husband, Otis Treece, was arrested for theft from his employer, Respondent City of Naperville ("City"). Prior to the arrest of Petitioner's husband, Petitioner sought out Respondent Officer Steven Hochstetler ("Hochstetler"), the City of Naperville police officer investigating Otis Treece, and repeatedly threatened him and his family with death in an effort to drop the investigation against Otis Treece. Thereafter, pursuant to a valid overhear order, Hochstetler recorded two conversations with Petitioner, capturing threatening statements made by Petitioner against him and his family.

Thereafter, Petitioner was charged with three counts of intimidation, charges that were later dismissed by the DuPage County State's Attorney. Petitioner then sued the City and Hochstetler on state and federal claims of malicious prosecution along with a state claim of intentional infliction of emotional distress. The claims against Hochstetler were later submitted to a jury. The claims against the City were bifurcated, with the City agreeing to an entry of judgment in the event of a jury verdict against Hochstetler.

The jury rejected all of Petitioner's claims following a two-week jury trial. Petitioner's post-trial motion was also denied by the district court. The district court based its denial on Petitioner's complete lack of credibility and cited specific portions of the taped conversations that evidenced Petitioner's threats against Hochstetler and his family.

On appeal, the Seventh Circuit affirmed the rulings of the district court. The Seventh Circuit held that the district court properly excluded prejudicial evidence of Hochstetler's prior acts, based on their complete lack of similarity to Petitioner's claims. The Seventh Circuit then applied the Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 1572, 89 L.Ed.2d 806 (1986) (per curiam) to affirm judgment for the City, based on the jury's finding that Petitioner suffered no constitutional deprivation. Finally, the Seventh Circuit affirmed the decision of the district court to bifurcate the hearing, finding that the district court did not abuse its discretion.

Petitioner has completely failed to establish her claims against either the City or Hochstetler. Petitioner's failure is due in large measure to the mountain of evidence captured on audio and videotape that established her threats against Hochstetler and his family. Despite her failure to achieve any measure of success in establishing a factual basis for her claims, Petitioner now seeks to overturn the decisions of the jury, the district court and the Seventh Circuit, by asking the Court to find a conflict among the circuits in their application of *Heller* where no such conflict exists. The Petition should be denied.

A. THE DECISION OF THE SEVENTH CIRCUIT IS IN HARMONY WITH PRIOR SUPREME COURT DECISIONS AND OTHER CIRCUITS

In *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (per curiam), the Court held that a jury verdict acquitting a Los Angeles police officer

of a charge of excessive force precluded the imposition of liability on the City of Los Angeles for adopting a policy condoning the use of excessive force.

The Court reasoned that where a municipality is "sued only because [it was] thought legally responsible" for the actions of its officers, it is "inconceivable" to hold the municipality liable if its officers inflict no constitutional harm, regardless of whether the municipality's policies might have "authorized" such harm. *Heller*, 475 U.S. at 799, 106 S.Ct. at 1573. The Court concluded, "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." *Heller*, 475 U.S. at 799, 106 S.Ct. at 1573.

1) The Opinion of the Seventh Circuit is Consistent with *Heller*

The Seventh Circuit properly applied the Court's decision in *Heller* to the case at bar. The Seventh Circuit recognized that *Heller* establishes that municipal liability is derivative of its police officer's liability. *Appendix* at 9a. In applying *Heller*, the Seventh Circuit held that as a result of the jury verdict in favor of Hochstetler, "it is impossible under existing case law for the City to be held liable for the knowledge or inaction concerning its officer's activity." *Appendix* at 10a.

Here, as in *Heller*, Petitioner was unable to prove that she suffered any constitutional injury at the hands of Hochstetler. Moreover, Petitioner cited no evidence that offered any basis for municipal liability apart from the

actions of Hochstetler. Despite Petitioner's repeated claims of municipal action that could result in liability, the Petition does not set forth any facts independent of her claims against Hochstetler upon which municipal liability could rest in light of the jury's finding of no liability by Hochstetler. As a result, the Seventh Circuit correctly applied *Heller* in affirming the decision of the district court.

2) The Opinion of the Seventh Circuit is Consistent with Other Supreme Court Decisions

Petitioner argues that the decision by the Court in *Heller* is inconsistent with the Court's decisions in *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) and *Owen v. Independence*, 445 U.S. 622, 654, 100 S.Ct. 1398, 1417, 63 L.Ed.2d 673 (1980). Neither of these cases, however, addressed the issue of derivative liability before the Court in *Heller*. In fact, *Owen* predates the Court's decision in *Heller*. Therefore, Petitioner's position is without merit.

The Court in *Canton* held that a plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action – there, an allegedly inadequate training program – has led an employee to violate a plaintiff's rights, must demonstrate that the municipal action was not simply negligent, but was taken with "deliberate indifference" as to its known or obvious consequences. *Id.*, 489 U.S. at 388, 109 S.Ct. at 1204.

The issue in *Owen* was whether a municipality was entitled to the same qualified immunity as an individual defendant. In that case, the city council allegedly censured and discharged an employee without a hearing. While recognizing individual qualified immunity, the Court rejected a claim that municipalities should be afforded qualified immunity based on the good faith of their agents. *Id.*, at 651, 100 S.Ct. at 1416.

Neither *Canton* nor *Owen* conflict with the Court's decision in *Heller*. Moreover, Petitioner never explains how *Canton* and *Owen* conflict with *Heller*. Pet. at 15-18. The basic holding of *Heller* that a determination of no liability against a police officer removes any basis for liability against a municipality, simply does not conflict with *Owen* or *Canton*.

The decision in *Canton*, consistent with *Heller*, held the inadequacy of police training may serve as the basis for § 1983 liability *only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact*. *Id.*, 489 U.S. at 388, 109 S.Ct. at 1204 (emphasis added). Petitioner's well-worn refrain that evidence exists of a City policy of malicious prosecution, fails in light of the jury's determination that Petitioner did not suffer any constitutional deprivation at the hands of Hochstetler. Pet. at 17. Here, the jury determined that Hochstetler did not violate the rights of Petitioner. Therefore, under *Canton* and *Heller*, no liability can rest with the City and the Petition must be denied.

3) The Decision of the Seventh Circuit is Consistent with the Application of *Heller* by the Other Circuits

The decision of the Seventh Circuit in this case is consistent with decisions of other circuits applying *Heller*. The federal circuits have consistently applied *Heller* in the same manner as the Seventh Circuit in this case. *See Evans v. Avery*, 100 F.3d 1033, 1039-1040 (1st Cir. 1996); *Smith v. Edwards*, 175 F.3d 99, 107 (2nd Cir. 1999); *Grayson v. Peed*, 195 F.3d 692, 696 (4th Cir. 1999); *Saenz v. Heldenfels Bros., Inc.*, 183 F.3d 389, 392 (5th Cir. 1999); *Scott v. Clay County, Tenn.*, 205 F.3d 867 (6th Cir. 2000); *Tesch v. County of GreenLake*, 157 F.3d 465, 477 (7th Cir. 1998); *Wilson v. Spain*, 209 F.3d 713, 717 (8th Cir. 2000); *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 518 (9th Cir. 1999); *Myers v. Oklahoma County Bd. Of County Com'rs*, 151 F.3d 1313, 1316 (10th Cir. 1998); *Rooney v. Watson*, 101 F.3d 1378, 1381 (11th Cir. 1996).

Against this backdrop of overwhelming authority against her position, however, Petitioner directs the Court to several cases to support her claim that the decision of the Seventh Circuit in this case conflicts with other circuits in its application of *Heller*. A cursory examination of these cases undermines this contention.

Initially, it is important to note that most of the cases cited by Petitioner were decided prior to *Heller*. *See Smith v. City of Oklahoma City*, 696 F.2d 784 (10th Cir. 1983); *Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985); *Anderson v. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985). Lacking the guidance of *Heller*, these decisions do not provide support to Petitioner's position.

One of the cases cited by Petitioner decided after *Heller* is *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994). The court in *Fagan* ruled that when plaintiffs bring separate, independent constitutional claims against officers and their employers, employers will not automatically receive judgment in their favor following judgment for their officers. *Fagan*, 22 F.3d at 1291. Importantly, the *Fagan* court distinguished *Heller* based on the due process claims made in *Fagan* versus the Fourth Amendment claims made in *Heller*. *Fagan*, 22 F.3d at 1291-1292.

Unlike *Fagan*, Petitioner's claims against the City and Hochstetler were based on the same theories and the same set of facts. Moreover, Petitioner's claims were brought under the Fourth Amendment, like *Heller*, rather than the Fourteenth Amendment claims at issue in *Fagan*. Consequently, *Fagan* is distinguishable from the case at bar and does not support Petitioner's position.

Petitioner's reading of *Parrish v. Luckie*, 963 F.2d 201 (8th Cir. 1992) is also wrong. This case stands for the proposition that personal liability is not necessary for municipal liability, not that municipal liability is possible where an officer is exonerated. Consistent with *Heller* and the Seventh Circuit, the *Parrish* court concluded that a claim against an actor in his official capacity fails when the jury determines that the plaintiff's constitutional rights were not violated. *Id.*, 963 F.2d at 206. Therefore, this case does not support Petitioner's position.

4) Petitioner's Institutional Analysis Argument is Without Merit

For the first time, Petitioner advances the doctrine of "institutional analysis" in support of her argument. Pet. at 10. Petitioner failed to raise this theory of liability at any point before either the district court or the Seventh Circuit. Petitioner's failure to raise this argument constitutes a waiver. *See California v. Taylor*, 353 U.S. 553, 556, n. 2, 77 S.Ct. 1037, 1039, n. 2, 1 L.Ed.2d 1034 (1957). Even if properly raised, it is an understatement to say that Petitioner's theory of "institutional analysis" is without foundation. Petitioner fails to cite to any case that has ever entertained this theory, consistent or inconsistent with Petitioner's position.

Petitioner's primary support for this theory of liability is law review articles. Pet. at 10-11. The sole case cited in support of this theory, *Barrett v. Orange County Human Rights Com'n*, 194 F.3d 341 (2nd Cir. 1999), not only fails to mention this theory, but relies on two circuit court cases that predate *Heller* in reaching the portion of its decision relied upon by Petitioner. *Barrett*, 194 F.3d at 350; Pet. at 11. In *Barrett*, a wrongful discharge case, the court reasoned that since actions taken by the commission were decided as a body, judgment in favor of only two members of the commission did not automatically result in judgment for the entire commission. *Barrett*, 194 F.3d at 350.

In sharp contrast to the claims in *Barrett*, Petitioner alleged that her injuries were solely caused by the actions of Hochstetler, in that her arrest constituted a malicious prosecution by Hochstetler as a result of her failure to

pay him a bribe. Petitioner has consistently failed to cite to any facts not involving Hochstetler that caused any constitutional injury to her. Petitioner maintains this consistency by failing to cite any facts in her Petition that establish municipal liability apart from the factual allegations against Hochstetler. The jury, district court and Seventh Circuit unanimously rejected liability against Hochstetler based on these facts. Therefore, the Petition should be denied.

B. THE APPLICATION OF THE STATE LAW REQUIREMENTS FOR MALICIOUS PROSECUTION IS PROPER

Petitioner also challenges the Seventh Circuit's requirements for maintaining a malicious prosecution claim. Pet. at 10. Petitioner argues that she suffered a seizure under the Fourth Amendment and that the Seventh Circuit improperly applied a subjective instead of an objective malice test under *Reed v. City of Chicago*, 77 F.3d 1049 (7th Cir. 1996). Pet. at 18-22.

The opinion of the Seventh Circuit, however, did not address these issues, and for good reason. Petitioner did not raise the seizure issue or malice requirement under *Reed* in her appeal to the Seventh Circuit. These issues, as with Petitioner's "institutional analysis" theory, are waived because Petitioner failed to raise these issues at any point before either the district court or the Seventh Circuit. *See California v. Taylor*, 353 U.S. 553, 556, n. 2, 77 S.Ct. 1037, 1039, n. 2, 1 L.Ed.2d 1034 (1957).

Petitioner appears to challenge the jury instruction that set forth the elements of a malicious prosecution

claim under *Reed*. At no time, however, at the pre-trial conference, post-trial motion, or in the Seventh Circuit, did Petitioner raise an objection to the malicious prosecution instruction given to the jury. Jury instructions simply cannot be challenged for the first time in a Petition to the Court. *See Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), at 125-126, n. 28, 102 S.Ct. 1558.

The question introduced here by Petitioner concerning the appropriate malice context begs the question of whether there was sufficient evidence put forth by Petitioner to meet any of the elements of her claims, not simply the malice issue now raised for the first time.

The fact is that Petitioner does not question the jury's rejection of her incredible claims in the Seventh Circuit. Petitioner does not and cannot suggest that even if an objective malice instruction was tendered to the jury, the result would have changed to a judgment in her favor. Instead, Petitioner incorrectly asserts that the application of an objective malice test could result in municipal liability where Hochstetler was not liable based on the same facts. Pet. at 21. Simply put, Petitioner's claims were wholly unbelievable and did not meet any of the requirements of a malicious prosecution cause of action. Therefore, the Petition should be denied.

C. THE BIFURCATION OF THE TRIAL DID NOT CONSTITUTE AN ABUSE OF DISCRETION

Federal Rule of Civil Procedure 42(b) permits the separate trial of any issue when separation would be "in furtherance of convenience or to avoid prejudice, or when

separate trials will be conducive to expedition and economy. . . . " *DeWitt, Porter, Huggett Schumacher & Morgan, S.C. v. Kovalic*, 991 F.2d 1243 (7th Cir. 1993); *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1166 (7th Cir. 1983). Only one of these criteria need be satisfied for a court to order a separate trial. *Id.* The appellate court will review a district court's bifurcation decisions for an abuse of discretion. *Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 105 (3d Cir. 1992).

The case at bar presents all of the criteria for bifurcation. Bifurcation furthered convenience by allowing the City to avoid the costs and burdens of trial where the City had no liability unless Hochstetler was found liable. Here, the Seventh Circuit properly affirmed the decision of the district court, as the City did not need to bear the burdens of trial following the decision for Hochstetler on all counts. The ultimate decision to bifurcate under Rule 42(b) rests with the district court's discretion and will be overturned only upon a clear showing of abuse. *Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117, 1121 (7th Cir. 1999).

Bifurcation also avoided prejudice to Hochstetler by the elimination of facts irrelevant to the interaction between Hochstetler and Petitioner. The other incidents Petitioner sought to admit were ruled admissible only against the City under Petitioner's *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), claims. Bifurcation allowed the jury to focus on the facts surrounding Petitioner and Hochstetler, without the distraction and prejudice of considering other events having absolutely no bearing on Hochstetler's potential liability. Bifurcation allowed the exclusion of the other

events under Federal Rule of Evidence 403 and 404, but retained the ability of Petitioner to put these incidents before the jury if it found in favor of Petitioner, which it did not.

Separate trials against the City and Hochstetler also fostered expedition and economy. The finding by the jury in favor of Hochstetler on all counts vitiated the need for the introduction of any *Monell* evidence. The introduction of the other incidents under Petitioner's *Monell* claim would have involved countless additional witnesses and exhibits. This evidence would have extended an already lengthy two-week trial into a trial lasting a month or more, including trials within a trial. The district court's proper decision to bifurcate the trial saved a substantial amount of judicial time and resources and allowed a decision dispositive to all parties in less than half the time of presenting all the evidence as to Hochstetler and the City in one trial. The jury verdict in favor of Hochstetler on all counts confirmed the district court's decision to bifurcate the trial.

Despite these facts, Petitioner argues that bifurcation resulted in prejudice to her by excluding relevant evidence against the City. Pet. at 22. The evidence reserved for Petitioner's claim against the City had absolutely no relevance in Petitioner's claim against Hochstetler. The jury heard all of the evidence concerning Petitioner's interaction with Hochstetler and found against Petitioner on all counts. There simply were no facts relevant to Petitioner's interaction with Hochstetler that the jury did not hear and consider. Therefore, the decision by the district court to bifurcate the trial was proper and did not constitute an abuse of discretion.

II. MISSTATEMENTS OF FACT

The Petition is replete with misstatements of fact that Respondents set forth below, pursuant to Supreme Court Rule 15.

A. Petitioner Cites "Facts" That Ignore the Jury Verdict

Petitioner's Statement of the Case only provides a resuscitation of her claim that Hochstetler solicited a bribe from her in exchange for dropping charges against her husband, Otis Treece. Petitioner's Statement of the Case ignores the overwhelming evidence of her threats against Hochstetler and his family. This evidence consists of not only Hochstetler's testimony, but Petitioner's own incriminating statements contained on the two audio overhear tapes and Petitioner's own videotape. In addition, Petitioner was repeatedly impeached at trial. The jury plainly accepted this evidence of intimidation against Petitioner while rejecting Petitioner's story in finding for Hochstetler on all counts.

On Page 21, Petitioner asserts that Hochstetler and the City subjected her to a violation of the Fourth Amendment and "resultant deprivations". On Page 11, Petitioner then alleges that the City had an informal or tacit "custom or policy" of allowing constitutional violations. These assertions fly in the face of the jury's verdict finding that Petitioner suffered no constitutional deprivation from the actions of Officer Hochstetler and, therefore, the City. Petitioner's repeated assertions of constitutional violations simply do not make it so.

Petitioner's refusal to acknowledge the finding of the jury undercuts her entire Petition. Simply put, Petitioner's Statement of the Case cannot consist solely of her version of events that the jury considered and rejected. The jury simply could not have believed Petitioner's story and still rendered a verdict against her on all counts. Therefore, factual assertions in the Statement of the Case that are inconsistent with the jury's finding against Petitioner should be stricken.

B. Petitioner Cites "Facts" That the District Court Specifically Excluded as Misleading

On page 5, Petitioner asserts that Hochstetler created a police report alleging intimidation by Petitioner the day before the initial act of intimidation actually occurred. In reality, the date on this report reflected the date on which Hochstetler first encountered Petitioner at her home. The acts of intimidation by Petitioner against Hochstetler began the next day. Hochstetler incorporated the entire interaction with Petitioner into one report, dating the report from the first day he encountered Petitioner.

This specious argument was rejected by the district court and is now resuscitated by Petitioner. The fact is that the district court immediately sustained Respondent's objection to this fallacious argument at trial. The district court then admonished Petitioner's counsel and the jury that the use of this evidence was misleading and that the jury must ignore this line of questioning. The district court further admonished Petitioner not to raise this false issue again. This assertion has no more validity today than when rejected by the district court at trial.

C. Petitioner Inaccurately Recites the "Facts" Concerning the Prior Acts of Hochstetler

On page 5, Petitioner inaccurately recites the "facts" concerning the alleged prior acts of Hochstetler in falsely accusing individuals of crimes. First, the Petitioner fails to state that Zolghadr never filed any complaint asserting that Hochstetler falsely accused him of any crime. Second, no criminal charges were ever lodged against Marjorie Dalton's son.

Finally, in an allegation as misleading as the above-mentioned police report date, Hochstetler never filed a false report concerning Patricia Shetina. As the evidence clearly showed, another officer authored a report indicating he conducted an area canvass regarding a theft from Shetina's store, when he did not. Hochstetler had absolutely no involvement with the canvass.

Petitioner's citation as "facts" events that Petitioner knows to be untrue, and was specifically admonished at trial against their untrue and misleading nature, is outrageous. Moreover, as noted by the district court and the Seventh Circuit, none of these "facts" involved the alleged bribe demand in exchange for dropping criminal charges that is the centerpiece of Petitioner's claim. These "facts" should be stricken.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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(3)

No. 00-238

IN THE

Supreme Court of the United States

NAOMI TREECE,

Petitioner,

v.

STEVEN HOCHSTETLER and
CITY OF NAPERVILLE, ILLINOIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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ARGUMENT

I.

PETITIONER PROPERLY PRESERVED HER ARGUMENTS.

A plaintiff preserves her position on a legal issue by making that position known to the trial court. Contrary to respondents' argument, established law holds that once a plaintiff makes her position known on a legal issue and the trial court rules against her, she need not formallistically object every time the trial court adheres to its ruling. Petitioner had made clear to the District Court and the Court of Appeals that she contended that the City could have liability independently to that of Hochstetler if it maintained an informal "custom or policy" of permitting constitutional violations, despite the lack of malice. Petitioner also made clear her position that objectively unreasonable conduct, not malice, made out a "Fourth Amendment" type violation of Section 1983.

But, the trial court ruled on summary judgment that it would apply the Seventh Circuit's *Reed* standard, which required the petitioner as plaintiff, in order to make out a violation of Section1983, to prove both the Fourth Amendment "objective" unreasonableness of the defendants' conduct and the "subjective" malice elements of state malicious prosecution law. Thereafter, petitioner had no obligation to object to the continued application of *Reed* because Petitioner's position was well known to the District

Court. *See* FED. R. CIV. P. *46; see also, Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1060 (5th Cir. 1990) (argument not waived for lack of formal objection, where party's position on the applicability of a statute was known to the court); *Kraus v. Rhodes* 570 F.2d 563, 569 (6th Cir. 1977) (argument not waived on appeal, where district judge knew of party's position, despite no formal objection); *Stone v. Morris*, 546 F.2d 730, 736 (7th Cir. 1976) (formal objection not required and argument not waived, where the court knew the particular action the party desired).

Moreover, a petitioner need not cite below every case and law review article that supports its argument in order to preserve that argument or to cite to such authorities later. The respondents' argument, that petitioner waived the right to cite "institutional analysis" law review articles, lacks any semblance of legal merit.

II.

THIS CASE MERITS REVIEW.

Contrary to respondents' argument, that municipalities should never have independent liability post-*Heller*, that question merits review by this Court.

First, and in addition to the arguments in the Petition, respondents' assertion that pre-*Heller* cases provide no authority on which to base a Petition plainly lacks merit. *Heller* never overruled the cases petitioner cites. Nor does *Heller* reject the legal principle announced by most of the

Courts of Appeal, that a municipality can have liability for a custom or practice even if its employee lacks personal liability.

Second, respondents' citation of cases, which it contends apply its interpretation of *Heller,* merely underscores the split among the circuits, thereby requiring review by this Court. *See Resp't Br. in Opp'n at p. 6.* Third, and tellingly, respondents point to no decision of this Court which engrafts state law requirements of subjective wrongdoing onto the objective test this Court applies to unlawful seizure cases.

III.

PETITIONER HAS NOT MISSTATED THE FACTS.

One could only accept respondents' version of the "facts" if they had obtained criminal convictions of Mrs. Treece and of her husband. But, they did neither. The principal difference between the criminal cases they lost and the civil case against Hochstetler was the lower court's imposition of a requirement that Mrs. Treece prove subjective wrongdoing by Hochstetler. If one can infer anything about what the jury concluded below, it is only that, deprived of evidence concededly admissible against the City, the jury did not find Hochstetler to have acted with subjective malice. Moreover, the evidentiary rulings and the jury verdict were with respect to potential liability of Officer Hochstetler, not as to the City's potential independent liability.

Respondents have also misstated the facts. Mrs. Treece did not seek out Officer Hochstetler; rather, Hochstetler repeatedly contacted her. The centerpiece of the Petition is the allegation of constitutional violations due to the making of false reports and accusations, all adequately supported by the evidence and the outcomes of the criminal cases. This is not a case about bribe solicitation, an issue below only because the Seventh Circuit's decision in *Reed* required that state law subjective wrongdoing also be proven. Under a proper application of unlawful seizure law, no such element would have been necessary to try.

CONCLUSION

For the reasons set forth above and in the Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit as prayed.

October 10, 2000

Respectfully submitted,

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